

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:09-cr-10243-MLW

4
5 UNITED STATES OF AMERICA

6
7 vs.

8
9 RYAN HARRIS

10
11 *****

12
13 For Jury Trial Before:
14 Chief Judge Mark L. Wolf

15
16 United States District Court
17 District of Massachusetts (Boston.)
18 One Courthouse Way
19 Boston, Massachusetts 02210
20 Tuesday, February 28, 2012

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22 *****

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SPECIAL AGENT TIMOTHY RUSSELL

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1 P R O C E E D I N G S

2 (Begins, 9:00 a.m.)

3 THE CLERK: Criminal Matter 09-10243, the
4 United States versus Ryan Harris. The Court is in
5 session. You may be seated.

6 THE COURT: Good morning. Would counsel
7 please identify themselves for the record.

8 MR. BOOKBINDER: Good morning, your Honor.
9 Adam Bookbinder and Mona Sedky for the United States.

10 MR. MCGINTY: And Charles McGinty and
11 Christine Demaso for Mr. Harris, who is here seated at
12 the table.

13 THE COURT: Okay.

14 Is the government going to have one or two
15 witnesses today?

16 MR. BOOKBINDER: One.

17 THE COURT: So that would be Mr. Russell?

18 MR. BOOKBINDER: Yes.

19 THE COURT: All right. And I may have been
20 somewhat equivocal about this yesterday, but Exhibit 3,
21 Pages 3 through 6, are excluded. I said you should
22 proceed on that assumption.

23 And have the remainder of the exhibits you'd like
24 to use with Mr. Russell been revised?

25 MR. BOOKBINDER: Yes, your Honor.

1 THE COURT: All right. And about how long do
2 you think his testimony will be?

3 MR. BOOKBINDER: Um, you know, probably not
4 more than half an hour. Maybe less.

5 THE COURT: Okay. That's fine.

6 And then there are some stipulations. I don't
7 think they've been read yet to the jury. Have they?

8 MR. BOOKBINDER: No.

9 THE COURT: Are you planning on doing that?

10 MR. BOOKBINDER: Sure. We might as well.

11 THE COURT: You might as well? If you don't
12 read them, they're not in evidence.

13 MR. BOOKBINDER: I think the factual
14 stipulations are fairly basic, but we should do it.

15 THE COURT: If you want the jury to rely on
16 it, unless I mark them as an exhibit, they have to be
17 read.

18 MR. BOOKBINDER: Yes, but just the factual
19 stipulations, your Honor.

20 THE COURT: Well, let me see. Yes. Well,
21 that relates to my second question concerning the -- are
22 you content just to read them or are you asking that any
23 of them -- I think in this case -- well, sometimes the
24 stipulations get marked and go to the jury as exhibits.
25 But here you have three factual stipulations, correct?

1 MR. BOOKBINDER: Correct, and I think it's
2 fine to --

3 THE COURT: I think it's sufficient to just
4 read them, is that what you're saying?

5 MR. BOOKBINDER: Yes.

6 THE COURT: I agree.

7 Okay. Is that acceptable, Mr. McGinty?

8 MR. MCGINTY: It is, your Honor.

9 THE COURT: All right.

10 Then after you rest I will make my final
11 **Petrozziello** rulings regarding Phillips, Lindquist,
12 Mr. T and MooreR.

13 Is there anybody else whom I need to make
14 **Petrozziello** rulings?

15 MR. BOOKBINDER: If I could have a minute,
16 your Honor?

17 (Pause.)

18 MR. BOOKBINDER: That's it, your Honor, at
19 this point.

20 THE COURT: That's what I thought.

21 All right. And then I'll excuse the jury, we'll
22 have the defendant's Rule 29 motion, we'll discuss the
23 jury instructions. You'll tell me how much time you
24 would like for your closings.

25 You're going to have to make some special effort

1 to assure that the exhibits that are on the disk that
2 goes back to the jury room are the exhibits as they
3 actually came in. This is the first time we've had that
4 system back there for the jurors, so I want to be
5 especially carefully about that.

6 MR. MCGINTY: And we're going to be, um --
7 around noontime or 1:00, recording the few exhibits that
8 we have to try to make sure this is seamless, um, to
9 make sure that everything is on that disk, and we'll
10 review that.

11 And me, too. I am, um, technologically
12 handicapped, so this is a -- this is a new thing for me.

13 THE COURT: Your client should help you.

14 (Laughter.)

15 MR. MCGINTY: I'm doing my best to try to make
16 sure this goes in.

17 THE COURT: No, I think it's so far so good.
18 Famous last words, perhaps, but so far so good.

19 All right. Why don't we get the jurors. And the
20 other thing I hope I'll remember to tell them is they're
21 predicting bad weather tomorrow, and I'll confirm this,
22 but if the Boston schools are closed, then they don't
23 come in, but if the Boston schools are open, then
24 they'll be here. Although I may give them a later
25 reporting time so I can go over what I propose to be the

1 final jury instructions, which should be tomorrow, but
2 we'll see.

3 All right. We'll get the jury. Unless you have
4 something else, then we'll get the jury.

5 (Jury enters, 9:10 a.m.)

6 THE COURT: Ladies and gentlemen, welcome
7 back. I spent time after you left yesterday, a lot of
8 time, making a number of evidentiary rulings. We have
9 one more witness and he may not be that long. So
10 continue to pay careful attention. I'd expect you'll be
11 excused quite early today and then I'll let you know
12 about the schedule tomorrow.

13 The government may call the next witness.

14 MR. BOOKBINDER: The government calls Timothy
15 Russell.

16 (SPECIAL AGENT TIMOTHY RUSSELL, sworn.)

17 MR. BOOKBINDER: Your Honor, if this is an
18 acceptable time, before we begin Mr. Russell's
19 testimony, I would like to read the stipulations the
20 parties have entered into?

21 THE COURT: Yes.

22 MR. BOOKBINDER: The parties agree that the
23 following facts are true.

24 THE COURT: And actually before you do that,
25 let me just remind the jurors.

Ladies and gentlemen, a stipulation are facts -- are an agreement to facts that -- a stipulation, um, relates to facts that the parties agree are true and that you may accept as true in deciding the case.

Okay.

MR. BOOKBINDER: "(1) the defendant, Ryan Harris, also used the internet name "DerEngel." (2) Harris was the founder, owner, and President of TCNISO, Inc. And (3) TCNISO is incorporated in California with its principal place of business in the San Diego area."

That's it.

SPECIAL AGENT TIMOTHY RUSSELL

* * * * *

DIRECT EXAMINATION BY MR. BOOKBINDER:

Q. Good morning, Mr. Russell.

A. Good morning.

Q. What do you do for work?

A. I'm a Special Agent with the Federal Bureau of Investigation.

Q. How long have you been an FBI agent?

A. For approximately 10 years.

Q. Are you assigned to a particular squad at the FBI?

1 A. I guess I am. I am assigned to the Cyber Crimes
2 Squad of the Computer Crimes Squad.

3 Q. Do you have a background in computer matters?

4 A. Yes, I do. While employed by the FBI, I received
5 specialized training in various computer matters.
6 Additionally I've held a number of computer-related jobs
7 prior to my employment with the Bureau.

8 Q. Can you just very briefly explain what your work was
9 before you became an FBI agent?

10 A. Yes. I held a title as a Computer Scientist, I've
11 also been a District Computer Engineer, and I was the
12 Director of MIS for a hospital in Florida.

13 Q. What's MIS?

14 A. Um, Management Information Systems.

15 Q. Okay. If you could just bring the microphone a
16 little closer to you and speak up a little bit to make
17 sure all the jurors can hear you.

18 And what kinds of cases do you investigate as a
19 member of the Cyber Crime Squad of the FBI?

20 A. Um, typically I investigate computer cases, I've
21 also investigated --

22 MR. MCGINTY: Objection.

23 THE COURT: Overruled.

24 A. I've also investigated internet fraud-type cases,
25 intellectual property right cases, and on occasion I've

1 also investigated administrative computer cases.

2 Q. Are you familiar with the ways that people access
3 and communicate over the internet?

4 A. Yes, I am.

5 Q. And do you have experience reading communications
6 that people have had with each other over the internet?

7 A. Yes, I do.

8 Q. Are you the FBI agent assigned to the case
9 investigation involving Ryan Harris?

10 A. Yes, I am.

11 Q. Who -- what other kinds of agents have you worked
12 with during the course of this investigation?

13 A. I've worked with other FBI agents, Special Agents in
14 the FBI office, as well as other divisions throughout
15 the country. I've also worked with agents from the IRS.

16 Q. Are you familiar with the software and the hardware
17 that TCNISO sold?

18 A. Yes, I am.

19 Q. How is it that you are personally familiar with
20 those products?

21 A. I'm familiar with the products having reviewed the
22 TCNISO website by conducting a number of interviews and
23 also having purchased and viewed the products myself.

24 MR. BOOKBINDER: Your Honor, I'd like to show
25 the defendant what's been marked as Exhibit 2. I don't

1 believe there's any objection to that. So if I could
2 just offer that now.

3 THE COURT: Yes. Exhibit 2 is admitted.

4 (Exhibit 2, marked.)

5 Q. Before I blow this up to make it look bigger for
6 everybody, what is Exhibit 2? And let me clarify. What
7 you see on your screen right now is one page, correct?

8 A. That's correct.

9 Q. Is Exhibit 2 a multipage document?

10 A. Um, yes, it is.

11 Q. And what is in Exhibit 2?

12 A. Exhibit 2 appears to be, um, screen shots or
13 captures of the TCNISO website.

14 Q. How are these particular screen captures preserved?

15 A. Um, these were preserved, um, once they were
16 downloaded they were saved on CDR media and stored in,
17 um, the FBI Boston office's evidence control.

18 Q. Who downloaded them, or was that something the FBI
19 did?

20 A. Yes, another agent in my office, um, downloaded
21 these files.

22 Q. Approximately when?

23 A. Approximately, I believe, in September of 2008.

24 Q. And, um, what is this first page, and this is Page 1
25 of Exhibit 2?

1 A. Um, Page 1 appears to be the main landing page of
2 the TCNISO website.

3 Q. So if you type in "TCNISO.net" on your browser, this
4 is what you would see as of September of 2008?

5 A. Um, that's correct.

6 Q. Um, let me, um -- I'm going to now blow up on the
7 screen a portion of this page. (Blows up.)

8 Okay. Can you -- well, why don't you read the
9 text here and what's after the bullets and then I'll ask
10 you some questions about it.

11 A. Okay. "The SB-5100 combo is by far the most popular
12 cable modem in use today. This package includes
13 everything you need, the SB-5100 cable modem, a
14 preinstalled pin header, the BlackCat USB programmer,
15 USB and Cat V cable, includes Sigma X2 firmware, buy at
16 price \$99.99 right now."

17 Q. Is this the product, one of the products that you
18 bought from the TCNISO website?

19 A. Yes, it is.

20 Q. And, um, is this a, um -- and this modem has been
21 modified or tell me what software is loaded onto this
22 modem?

23 A. This modem had the Sigma software loaded onto it.

24 MR. BOOKBINDER: We should pull up another
25 portion of this landing page.

1 Q. And I ask you to read it as well.

2 Okay. There's now a section in the center of the
3 page, it's titled "Sigma." Can you read what it says
4 under that?

5 A. Yes. "Sigma X2 build 140 stable beta has been open
6 for all members to try. Download build 140 here and
7 follow the instructions included to install. Please
8 post your experiences in our forums. Update build 142
9 has been released. Download a copy in the member's
10 area."

11 Q. It says "beta" there. What's a "beta"?

12 A. Um, "beta" is a stage in a program of software
13 developed when a company would release a stable version
14 of the software to a select group of users to try, and
15 then the users would report back to the developer any
16 kind of bugs or problems with the software. Um, beta
17 versions usually precede a final release copy of the
18 software.

19 Q. And when it says, um, "Please post your experiences
20 in our forum." What do you understand "our forum" to
21 mean?

22 A. I understand that to mean the forum that's located
23 on the TCNISO website.

24 Q. Now, I'd like to, um, show you exhibit -- I'm sorry,
25 Page 13 of this exhibit. Is this another portion of the

1 website?

2 A. Yes, it is.

3 Q. And we'll get an enlarged part of this. (Blows up.)
4 Just a little bit bigger.

5 Can you read what it says under "Welcome to the
6 official TCNISO shop"?

7 A. "This is a place where you can purchase many of the
8 items you have seen or heard about all over the
9 internet. We are an experienced company with more than
10 15,000, as of May, 2008, processed and shipped orders.
11 If you have any questions, don't hesitate to call or
12 e-mail us. And for your protection and privacy, the
13 entire shop is safely secured with a 128-bit
14 encryption."

15 Q. Now, I'd like to show you Page 15. I'll try to blow
16 up the portion. (Blows up.) Under the headline on the
17 heading "Tutorial Description," there are a list of
18 things under that, under that title. What are those?
19 What's going on here?

20 A. Um, that's a list of various tutorials that's
21 offered to users on the TCNISO website.

22 Q. And to the right of most of them there's something
23 that says "Read" and it's underlined. What are those?

24 A. Those are links to the corresponding tutorials.

25 Q. When you say "tutorial," did you look at some or all

1 of these?

2 A. Um, yes, I did.

3 Q. What form do the tutorials take?

4 A. Um, the tutorials can take the form of, um, either
5 video or text that, um -- text instructions that the
6 user would have to read.

7 Q. All right. Can you read just the first three items
8 under "Tutorial Description."

9 A. Yes. "Traditional uncapping. Change firmware using
10 a console cable ethernet boot using BlackCat to modify a
11 SB-5100 cable modem."

12 Q. That's enough for now.

13 And for each of those there's a link to an article
14 describing that information?

15 A. That's correct.

16 Q. Let me show you now Page 18 and blow up -- there are
17 33 items on this page and we'll blow one of them up so
18 everybody can see it. And ask you --

19 First of all, um, so it says -- this item says
20 "TCNISO Video Number 1." Can you read the text below
21 that.

22 A. "Something we should have done a long time ago, make
23 an official how-to-video, everything you need to know in
24 order to install a serial cable and flash with Sigma,
25 shown step by step. Enjoy."

1 Q. When it says "install a serial cable and flash with
2 Sigma," what does that mean?

3 A. A serial cable is a type of computer cable that
4 connects the modem to a user's computer and flashing
5 with Sigma simply means to install the Sigma program
6 onto the cable modem.

7 Q. And there's -- below that information there's a link
8 or there's something that says "download." Did you --
9 have you actually clicked on those links?

10 A. Yes, I have.

11 Q. What does that get you to?

12 A. It actually downloads a video file.

13 Q. And what's shown in this particular video file?

14 A. In this particular video file it shows someone
15 installing a serial cable and flashing signal onto a
16 modem.

17 Q. In your review of this, um, the TCNISO website, did
18 you see the name "Ryan Harris" anywhere on that
19 website?

20 A. Um, I don't recall ever seeing the name on the
21 website.

22 Q. How about "DerEngel"?

23 A. That I have.

24 Q. Now, I'm going to show you what's been marked as --

25 MR. BOOKBINDER: And this is documents not yet

1 in evidence, as Exhibit 22. So, I guess, your Honor,
2 this should not yet go to the jury.

3 THE COURT: The jury's monitors are off.

4 MR. BOOKBINDER: Thank you.

5 Q. What is -- again this is a document with more than
6 one page, is that correct, based on your review of it in
7 the past?

8 A. Um, yes.

9 Q. And what is this portion?

10 MR. MCGINTY: Objection.

11 THE COURT: Well, okay. I think the objection
12 is one that we discussed yesterday. So the first page
13 is admissible under Rule 801(d)(2)(A), as I understand.

14 MR. BOOKBINDER: The first page and the second
15 page, your Honor.

16 THE COURT: I don't think so. The second page
17 -- Oh, okay, the first page and the second page. Fine.
18 The first page and the second page are admissible. The
19 third page I excluded.

20 MR. BOOKBINDER: That's right, your Honor.

21 THE COURT: Okay.

22 Q. So what is this? What are we looking at? What is
23 Exhibit 22 at least an excerpt of?

24 A. Exhibit 22 is an excerpt of one of the pages of the
25 TCNISO forum.

1 Q. And, um, fair to say that this is a portion of a
2 thread on those forums?

3 A. That's correct.

4 Q. What's a "thread"?

5 A. A "thread" on the forum is when someone posts a
6 subject matter or a topic on the forum and a "thread"
7 are the responses to that topic on the forum.

8 Q. And was this portion of the website downloaded by
9 the FBI at the same time as Exhibit 2 that we just
10 looked at?

11 A. Um, yes, it was.

12 MR. BOOKBINDER: Your Honor, the government
13 offers Exhibit 22.

14 THE COURT: It is admitted as -- Pages 1 and 2
15 are admitted.

16 MR. MCGINTY: Your Honor, with the note made
17 of the prior objections.

18 THE COURT: Yes, the objections have been
19 overruled.

20 (Exhibit 22, marked.)

21 Q. Now that the jury is looking at this, can you, um --

22 MR. BOOKBINDER: Why don't we blow up a
23 portion of this.

24 Q. All right. So up at the top it says "board index"
25 and then "TCNISO development discussions" and then

1 "DOCSIS." What is that?

2 A. That's the actual topic area of the forum that we're
3 currently inside of.

4 Q. So is it fair to say that there's a board index,
5 that's the overall sort of index, and then there's a
6 subtopic that's "TCNISO development discussions," and
7 then another subtopic that's "DOCSIS," is that right?

8 A. That's correct.

9 Q. Okay. And then here it says -- and then below that
10 it says "Cox Communications configs." What is that?

11 A. Cox Communications is a cable ISP in the U.S. and
12 "configs," I believe, refers to the cable modem
13 configuration files.

14 Q. And this is the particular topic that this thread is
15 about, is that correct?

16 A. That's correct.

17 Q. All right. Now, there's nothing below that and
18 that's because those the postman redacted on this
19 particular version, correct?

20 A. That's correct.

21 Q. Okay. Now, we look at the second page.

22 All right. Can you read that? What is this? Is
23 this a post?

24 A. Um, yes, it is.

25 Q. Who is this by?

1 A. That appears to be by DerEngel.

2 Q. And the date?

3 A. March 27th, 2007.

4 Q. Can you read it.

5 A. "I am checking up on something for a friend. Does
6 anyone have any verified MAC addresses and/or config
7 files for Phoenix, Arizona? It's sensitive. Just PM
8 me. Rewards will follow."

9 Q. What do you understand a "verified MAC address
10 and/or config file" to be?

11 A. I believe that to refer to the, um, cable modem MAC
12 addresses that have been verified to operate on the
13 ISP's network.

14 Q. Which ISP in this case? Is this related to a
15 particular topic we saw earlier?

16 A. Yes, it's under the "Cox Communications forum topic"
17 and this is referring to a Cox verified MAC addresses.

18 Q. And it says that at the end -- towards the end, I
19 suppose, it says "if sensitive, just PM me, rewards will
20 follow." What do you understand "PM me" to mean?

21 A. In this context, um, I believe it refers to a
22 private message, which is a capability that forums have
23 for reasons of communicating.

24 Q. To communicate privately, not posting for the world
25 to see?

1 A. That's correct.

2 Q. And, um, then the right-hand part of this post, it
3 says "DerEngel" and what does it say below that?

4 A. "Posts 230, joined" --

5 Q. Go ahead.

6 A. " -- joined Wednesday, April 21st, 2004."

7 Q. And the "Posts 230," what do you understand that to
8 mean?

9 A. I understand that to mean the amount of posts
10 DerEngel has made on the forums.

11 Q. Okay. You mentioned earlier that you had bought
12 products from the TCNISO website?

13 A. That's correct.

14 Q. Approximately when was that?

15 A. Um, it's approximately, um, November, December of
16 2008.

17 Q. Did you use your real name to make those purchases?

18 A. No, I did not.

19 Q. Why not?

20 A. Um, we didn't want to alert TCNISO of law
21 enforcement involvement.

22 Q. So what kind of name did you use?

23 A. I used a covert name.

24 Q. What did you buy?

25 A. I purchased a SB-5100 BlackCat combo and I believe I

1 also purchased the SB-4200 modified cable modem.

2 Q. So two modems?

3 A. Um, two different types of modems, yes.

4 Q. Anything else?

5 A. I also purchased the "Hacking" -- the cable modem
6 book.

7 Q. Um, if I could take a look at -- I'm going to ask
8 you about Exhibit 16 of this.

9 I'm showing you now the two modems --

10 MR. BOOKBINDER: Sorry, your Honor, I forgot
11 to ask to approach.

12 Q. Um, one of the two modems that has been marked as
13 Exhibit 16. Do you recognize that?

14 A. (Looks.) Yes, I do.

15 Q. And is that one of the modems that you bought from
16 TCNISO?

17 A. Yes, it is.

18 Q. And did you -- and so you ordered it, but did you
19 actually receive from them in the mail or in some other
20 form?

21 A. Yes, I did.

22 Q. And did you give it to anybody to test it?

23 A. Um, yes. Once I received it, I sent, um, one of
24 each type of the modems I received to Motorola to test.

25 Q. Now, I'd like to, um -- I'd like to show you Exhibit

1 7 --

2 MR. BOOKBINDER: And I believe there's no
3 objection. It's not in evidence yet. But there's no
4 objection to it.

5 So the government would offer Exhibit 7. And
6 that's the --

7 THE COURT: Exhibit 7 is the book, correct?

8 MR. BOOKBINDER: Yes, it is the book.

9 THE COURT: It is admitted.

10 (Exhibit 7, marked.)

11 Q. Now, I'm just going to show you a portion of it on
12 the screen. (On screen.) All right. It's now on the
13 screen.

14 Is that the cover of the book that you bought?

15 A. Yes, it is.

16 Q. And can you just read what it says on the cover?

17 A. "Hacking the Cable Modem. What Cable Companies
18 Don't Want You to Know. DerEngel."

19 Q. I'd like to show you the, um, second page of this
20 exhibit.

21 And what is this?

22 A. Um, it appears to be the second copyright page of
23 the book.

24 Q. So the inside cover essentially of the book or one
25 of the inside pages?

1 A. Um, yes.

2 Q. Is, um -- do you see Ryan Harris's name on this page
3 anywhere?

4 A. Yes, I do.

5 Q. Where is it, could you just describe it? Let me
6 just highlight it. (Highlights.) Okay. I've now
7 highlighted it.

8 Is that on the top line after it says "copyrighted
9 in 2006," does that say "by Ryan Harris"?

10 A. Yes, it does.

11 Q. Um, based on your review, is that the only place in
12 the book where his name appears?

13 A. Um, that's only place I noticed his name.

14 Q. Let me show you exhibit -- Page 3 of this exhibit
15 and ask you to read the highlighted portion. Go ahead.

16 A. "This book is dedicated to all the righteous hackers
17 that have been silenced by greedy corporations."

18 Q. This is the dedication?

19 A. Yes.

20 Q. And it goes on to talk about or say something about
21 his wife after that?

22 A. That's correct.

23 Q. I'm showing you now Page 4 and I ask you to read a
24 portion of this. (Blows up.)

25 Okay. Can you read, um, the beginning of this

1 page and I'll just let you know when to stop.

2 A. Okay.

3 "My life is very different from that of most
4 people. My dream world begins after I wake up. Every
5 day is a new challenge. There's always progress to be
6 made or work that is never finished. I make my living
7 by pioneering hacking techniques and writing software
8 from my clandestine residence in Hong Kong. I describe
9 myself as a "hacker," but I'm not one of those people
10 who spends every waking moment trying to breach computer
11 networks. My name is DerEngel and I hack cable modems.

12 It all began five years ago when a close friend
13 and I were attempting to make our cable modems go faster
14 using hardware modifications to remove barriers that we
15 believe were installed to limit their speed. Once we
16 accomplished this task, I designed a small website that
17 described how others could do the same and then,
18 ironically enough, hosted the website on the very
19 computer with the newly-uncapped cable modem.

20 I published that website in April, 2001 under the
21 name, 'TCNISO,' which stands for 'Telesign Industrious
22 Standard Organization'."

23 Q. Okay. You can stop right there. I'm now showing
24 you, um, Page 9 of this exhibit. Again, just read, um
25 -- would you read just the highlighted portion under

1 "Always hack responsibly."

2 A. "Although I have been the source of many cable modem
3 hacking techniques, I do not condone theft of service."

4 Q. Is this what you would describe as a "disclaimer"?

5 A. Um, yes, it is.

6 Q. I show you now, um, Page 12 and again I just ask you
7 to read the highlighted portion in this section that's
8 entitled "The cap."

9 A. "This provider-imposed limitation soon came to be
10 known as 'the cap.' Commonly people trading files on
11 internet would query another cable user with 'What is
12 your upload cap?' Users with higher upload speeds had
13 higher priority when it came to file trading. Once we
14 realized that this cap could be removed, I came up with
15 a term, 'uncap,' and published a few HTML files on line
16 that expose this limitation and how to get around it.
17 My goal was clear. I wanted to uncap as many cable
18 modems as possible. The war had begun."

19 Q. Okay.

20 MR. BOOKBINDER: Your Honor, the government
21 now offers Exhibit 30, to which again there's no
22 objection. This is the PayPal summary record.

23 THE COURT: Exhibit 30?

24 MR. BOOKBINDER: Yes.

25 THE COURT: Okay. It is admitted.

1 (Exhibit 30, marked.)

2 MR. BOOKBINDER: I'll blow up a portion of
3 this.

4 Q. And as I do that, Special Agent Russell, could you
5 explain to the jury what this is?

6 A. This is a PayPal subscriber, um, business record
7 document.

8 Q. Okay. And what is the, um -- what's the name listed
9 under "user info"?

10 A. Um, Ryan Harris.

11 Q. How about the company name below that?

12 A. TCNISO.

13 Q. Can you see what the date on here is that this
14 PayPal account was created?

15 A. Under "time created," has November 5th, 2001.

16 Q. And what's the date that this particular record was
17 generated off the top of your head?

18 A. February 17th, 2009.

19 Q. And do you see on here an entry indicating the total
20 amount of money received into this PayPal account?

21 A. Um, yes.

22 Q. What is that?

23 A. It appears to be a little over \$772,000.

24 Q. \$772,000, and now that just reflects the amount of
25 money that just came into the PayPal account, is that

1 correct?

2 A. That's correct.

3 Q. When you bought your products from TCNISO, did you
4 pay with PalPal?

5 A. No, I did not.

6 Q. How did you pay?

7 A. I paid with a credit card.

8 Q. So credit card purchases with customers are not
9 reflected in that \$772,000 figure?

10 A. That's correct.

11 Q. There's been some discussion in the course of this
12 trial about the concept of someone being anonymous over
13 the internet. Are you familiar with the ways that
14 people can make themselves anonymous?

15 A. Um, yes, I am.

16 Q. All right. And so if somebody wants to do something
17 on the internet and they don't want it coming back to
18 them, um, how are some -- well, what are some simple
19 ways that people can make that happen?

20 A. Um, there are -- one way is there are a number of
21 websites that offer anonymous-type of browsing. A user
22 could go to that website.

23 Q. Do you know any in particular?

24 A. Um, ones that site -- I believe it's
25 "Anonymizer.com."

1 Q. All right. And so if you go to that website, then
2 what? What do you do?

3 A. Basically the website offers you a type of proxy
4 service, so, um, you would essentially -- that
5 anonymizer.com would be browsing for you. So they would
6 be leaving these sort of tracks over the internet and it
7 wouldn't come back to the user.

8 Q. All right. So we've got the website anonymizer.com
9 and sites like that that you're familiar with?

10 A. Oh, yes, a number of them.

11 Q. So that's one option.

12 What other ways might someone -- where someone
13 could go physically, for example, if they wanted to have
14 anonymous web browsing?

15 A. Um, again, individuals can -- if they have a WIFI-
16 enabled device, they can go to a number of free hot
17 spots such as coffee shops, libraries, things of that
18 sort and again they could brows using those free hot
19 shots.

20 Q. So you could go to Starbucks, for example?

21 A. That's correct.

22 Q. And you mentioned the library, do you need your own
23 computer if you want to get the internet access at the
24 library?

25 A. Um, I believe most libraries offer computer

1 services.

2 Q. So you could just go there and use one of their
3 computers, too?

4 A. That's correct.

5 Q. And were these things -- and particularly focusing
6 on the period at issue in this case, from 2003 to 2009,
7 are these things that people would have to pay for if
8 they wanted to get anonymous internet access?

9 A. Um, to my knowledge all of these services were free.

10 Q. Now, um, I want to ask you now about a series of
11 documents that have not yet been admitted. These are --
12 they've been marked for identification as, I believe,
13 Exhibits D3 through D6, and maybe I'll just hand them to
14 you, if you want.

15 (Pause.)

16 THE COURT: Okay.

17 MR. BOOKBINDER: Your Honor, I'll ask some
18 questions that apply to all of them, I thought it would
19 be easier just to hand him all the exhibits first, and
20 when we go to them specifically, I'll be showing them on
21 the screen.

22 THE COURT: Okay.

23 (Pause.)

24 MR. BOOKBINDER: Oh, sorry, your Honor. It's
25 D4 to D7 that I want to show to him.

1 (Pause.)

2 THE COURT: Okay.

3 Q. If you would just take a look at those for a
4 second. I want to make sure I have all of those.

5 A. (Reads.)

6 MR. BOOKBINDER: There's one more, your Honor,
7 as well.

8 THE COURT: Okay.

9 Q. If you would take a look at that one as well and
10 then I'll ask you questions that apply to all of these.

11 A. (Looks.)

12 Q. Do you recognize these documents, Special Agent
13 Russell?

14 A. Um, yes, I do.

15 Q. And what are they, generally?

16 A. Um, these are excerpts from chat logs.

17 Q. Have these documents been received during the course
18 of your investigation?

19 A. Yes, they have.

20 Q. Where did you get them from?

21 A. Um, I received these from Craig Phillips's attorney.

22 Q. Approximately when?

23 A. Um, approximately January of 2010.

24 Q. And when you received them, what did you do with
25 them? Well, actually, let me strike that. Let me

1 rephrase it.

2 In what form did you recently get these documents?

3 A. Um, they were saved on a DVR, a recordable device.

4 Q. So a recordable DVD, right?

5 A. Correct.

6 Q. And when you received them, what did you do with
7 them?

8 A. Um, I placed them in our evidence control.

9 Q. Did you alter them in any way?

10 A. No, I did not.

11 Q. Now, what is marked for identification of these
12 exhibits, are they the complete logs of the chats that
13 you received?

14 A. No, they're not.

15 Q. They're portions of them, is that right?

16 A. That's correct.

17 Q. And even those pages, those particular pages have
18 been redacted so that only some information is on them?

19 A. That's correct.

20 MR. BOOKBINDER: Your Honor, the government
21 offers Exhibits 17 through 21.

22 MR. MCGINTY: Previously objected to, your
23 Honor.

24 THE COURT: All right. Well, I find that
25 they've been proven to be authentic, based on

1 Mr. Phillips's testimony and the testimony I just heard,
2 and for the reasons I stated yesterday, I believe on
3 February 8th, each of them is admissible.

4 MR. MCGINTY: Your Honor, may we approach?

5 THE COURT: Okay.

6

7 AT THE SIDEBAR

8 THE COURT: Actually, I stated that wrong. Go
9 ahead, state your objection, and then I'll --

10 MR. MCGINTY: The Court had stated -- the
11 Court had stated in front of the jury that these are
12 proven to be authentic. I think the Court's rulings on
13 admissibility are different. That when the Court said
14 these are, in fact, authentic, and made that comment in
15 public, the Court has suggested to the jury to find that
16 they are authentic, which is the jury's actual
17 determination, which, I would submit, is improper. I
18 would submit that the jury, as to the evidence, be
19 instructed that the Court has made no such finding on
20 that to the jury.

21 THE COURT: I'll do that. I'll tell them --
22 all right. Let me just -- I will tell them that they
23 will -- essentially this is the issue of Phillips. I
24 personally am satisfied of two things. Personally I'm
25 satisfied it has been shown by a preponderance of the

1 evidence that Phillips took these off the network
2 computers. I'm also satisfied there's enough evidence
3 for the jury to find that. And I'll tell them right now
4 that they actually have to make that determination. But
5 that when I said "authentic," I was talking shorthand,
6 and I meant that these were admissible and they'll have
7 to decide what they are and where they came from.

8 MR. MCGINTY: Well, I think that --

9 THE COURT: What would you like me to tell
10 them?

11 MR. MCGINTY: I think the Court should say
12 that the Court had misspoken and that it directs them
13 now to understand that there is no finding that these
14 were authentic.

15 THE COURT: All right. Okay.

16
17 (In open court.)

18 THE COURT: Ladies and gentlemen, I want to
19 correct something I just said. I misspoke. What I
20 meant to say is that these documents are admissible,
21 that it's proper for you to see them, but that it's up
22 to you to decide whether they're authentic, whether they
23 are what -- well, to decide what they are, where they
24 came from, and who made any of the statements in them.
25 Okay?

1 (Exhibits 17 through 21, marked.)

2 MR. BOOKBINDER: Your Honor, the government --
3 well, so if they've all been admitted, I'd like to show
4 --

5 THE COURT: Well, part of the problem is --
6 here. Okay. Go ahead. Which --

7 MR. BOOKBINDER: I'd like to start with
8 Exhibit 17, your Honor, and I'd like to show that to the
9 witness and to the jury.

10 THE COURT: All right.

11 MR. BOOKBINDER: Specifically I'm going to
12 show you Page 2 of Exhibit 17 and -- well, all right.
13 Q. Now, as with the --

14 MR. BOOKBINDER: Actually let me scroll over
15 for a second so we can get the date and time here.
16 Okay.

17 Q. So what's the date of this particular chat?

18 A. April 6th, 2005.

19 Q. And these are around 4:00 in the afternoon, is that
20 right?

21 A. That's correct.

22 Q. And who are the two parties that are chatting?

23 A. Mr. T and DerEngel.

24 Q. As with the ones we showed earlier, are the DerEngel
25 portion of these chats highlighted and the Mr. T

1 portions not?

2 A. Yes.

3 Q. All right. So the first column, the leftmost
4 column, is the speaker, and the column on the right is
5 essentially the listener, correct?

6 A. That's correct.

7 Q. All right. Now I'm going to scroll over so we're
8 not going to see those columns because I want to make
9 sure it's big enough for people to read it.

10 If you could -- for this one, if you could read
11 the Mr. T portion of the chat that's included in that
12 box and I'll read the DerEngel lines.

13 A. Okay. Um, "So I was trying to find a way to get
14 some extra cash and you might come in handy to help me
15 get some decent apartments, LOL."

16 Q. "And I might come in handy?"

17 A. "Yeah. Well, I was wondering if you could give me a
18 commission or something like that if I get people to
19 uncap using TCNISO software/hardware, but if you can't,
20 I totally understand."

21 Q. "LOL. I'm sure we can work something out."

22 MR. BOOKBINDER: Now I'll go to the next page
23 and this is Page 3 of Exhibit 17. And I'll blow up a
24 portion of it.

25 What's the date here?

1 A. April 20th, 2005.

2 Q. Again this is Mr. T and DerEngel?

3 A. That's correct.

4 Q. Can you again read the Mr. T portion?

5 A. "Well, I mean, is Sigma working 100 percent with all
6 ISP?"

7 Q. "Everyone except Adelphia, yes, and maybe one in
8 Australia."

9 A. "Okay. Cool. What are those ISP doing?"

10 Q. "Something with the modem's cert. We will have it
11 cracked soon."

12 A. "Yes."

13 Q. What's an "Adelphia"?

14 A. "Adelphia," that's a cable ISP.

15 Q. And so where it says "everyone except Adelphia,"
16 that's one particular ISP?

17 A. That's correct.

18 Q. And then down below, um, DerEngel said -- the
19 question is: "What are those ISP doing?" And the
20 answer is, from DerEngel, "Something with the modem's
21 cert, we will have it cracked soon."

22 What do you understand the "modem's cert" to be?

23 A. Um, the modem's certification.

24 Q. What's that?

25 A. It's a type of security feature that some ISPs

1 employ to have the modem authenticate with the, um, CMTS
2 at the ISP.

3 Q. So it's a way of essentially preventing hacking of a
4 modem?

5 A. That's correct.

6 Q. Then the -- "Something with the modem's cert. We
7 will have it cracked soon."

8 What does "cracked" mean?

9 A. "Cracked" is a term used to associate with the
10 cracking of the security in a certain type of software
11 or hardware.

12 Q. It's essentially getting around a security feature?

13 A. That's correct.

14 Q. Um, all right.

15 Now, I want to show you Exhibit 18. This is just
16 a one-page exhibit. Actually there's just one line
17 there.

18 What's the date?

19 A. September 13th, 2005.

20 Q. And this is DerEngel chatting with someone by what
21 name?

22 A. It appears to be "killswitch."

23 Q. And the one line there is by which speaker?

24 A. By DerEngel.

25 Q. Could you read it.

1 A. "And I created the entire cable modem hacking
2 scene."

3 Q. Now I'd like to show you Exhibit 19. This is a
4 one-page document and I'd ask you what the date is here?

5 A. June 21st, 2005.

6 Q. And who is DerEngel chatting with in this one?

7 A. It appears to be X-Factor.

8 Q. And who is the speaker in this portion?

9 A. DerEngel.

10 Q. Can you read what he says.

11 A. "I still can't believe I get 15K a month and I have
12 never advertised. It's unbelievable."

13 Q. I'm showing you Exhibit 20. And, again, the first
14 page of this exhibit.

15 What is the date there?

16 A. July 13th, 2005.

17 Q. Who is DerEngel chatting with in this one?

18 A. It appears to be "Shagy."

19 Q. S-H-A-G-Y?

20 A. That's correct.

21 Q. And, um, I'll read the DerEngel portions if you
22 read -- actually I have to blow it up a little bit
23 differently. Let's see. (Blows up.) Okay. Um, I'll
24 read the DerEngel portion, you read the Shagy.

25 "Dude, I love Sigma, 230 KB upload consistent."

1 A. "What did you do, flash the firmware on the modem at
2 the hotel?"

3 Q. "I'm at Craig's now using his spare, uncapped modem
4 on RR."

5 What's "RR"?

6 A. I believe "RR" stands for "Roadrunner," which is a
7 cable ISP.

8 Q. Now, I want to show you Exhibit 21 and I'm going to
9 the third page of this exhibit. And I'll blow this up.
10 (Blows up.) Okay.

11 What's the date of this chat, Exhibit 21?

12 A. August 5th, 2005.

13 Q. And this time who is DerEngel chatting with?

14 A. MooreR.

15 Q. That's M-O-O-R-E, capital R?

16 A. That's correct.

17 Q. And, again, um, I'll read the DerEngel portions, you
18 can read the MooreR portions.

19 "We have to pick on a name that is not, well,
20 Google friendly. Example, 'Cable Modem Sniffer' is a
21 bad search result. Make sense?"

22 A. "Yeah."

23 Q. "So let's play around with some names such as 'LAN
24 Thief,' 'CoaxThief,' 'Modem Thief,' 'LAN sniff,' et
25 cetera, et cetera."

1 A. "Okay. No problem. So you liked the sniffer?"

2 Q. "It's very well designed. Love the GUI. Did you
3 decide on a name yet?"

4 A. "No, I have been away, but 'Coax Sniffer' or 'Thief'
5 is pretty promising."

6 Q. Let me stop you right there and ask you about a few
7 things there.

8 All right. So at the beginning, um, when DerEngel
9 says "We have to pick a name that is not, well, Google
10 friendly," what do you understand that to mean?

11 A. Um, Google is a search engine and, um, "Google
12 friendly," I believe that to mean --

13 MR. MCGINTY: Objection.

14 THE COURT: Overruled. You may answer.

15 A. Um, and Google is a search engine and I believe
16 "Google friendly" is something that -- well, will
17 generate a common result.

18 Q. So, um, and then there's a discussion about possible
19 names and then -- and there is a portion further down
20 where DerEngel says, talking about this sniffer program,
21 "It's very well designed. Love the GUI." What is --
22 it's "GUI." What does that stand for?

23 A. It stands for "Graphical User Interface," um, and
24 when someone's on a windows-type machine, it's the
25 display that they see. It's usually associated with a

1 pointing and clicking-type of an icon.

2 THE COURT: I'm sorry. It's associated with
3 what?

4 THE WITNESS: A pointing and clicking icon.

5 Q. So it's the way that the user interacts with the
6 program, correct?

7 A. That's correct.

8 Q. All right. Now, I want to scroll down to the bottom
9 of this page and the last line. Again, this is
10 DerEngel, "Did you decide on a name?" And then I want
11 to go to the next page.

12 Is the next page the continuation of that chat?

13 A. Um, I can't see the whole thing.

14 Q. Oh, I'm sorry. Let me scroll over, so you can see
15 it.

16 So the question was, "Did you decide on a name?"
17 Can you read the next line.

18 A. "I think we will do 'CoaxThief' or 'CM-Sniff'."

19 Q. "I prefer CoaxThief, it has an edge to it." And is
20 that DerEngel that says "I prefer CoaxThief, it has an
21 edge to it"?

22 A. That's correct.

23 Q. All right. And then Page 5 of this exhibit, and
24 this is Exhibit 21 still.

25 What's the date of this portion of the chat?

1 A. September 2nd, 2005.

2 Q. It's still DerEngel and MooreR chatting?

3 A. That's correct.

4 Q. Since this is pretty much all DerEngel other than
5 one line, could you just read this.

6 A. "You should know by now that I never answer personal
7 questions."

8 Q. And then -- so that's DerEngel saying that, correct?

9 A. That's correct.

10 Q. And then MooreR says "Okay." Go on.

11 A. "To me everything is about hacking, to succeed you
12 must focus or you will never overcome the impossible."

13 "Dude, I think you forget, I'm a professional hacker as
14 in it's what I do for a living. It's what pays my
15 bills. I get paranoid just to check who's at my front
16 door."

17 Q. And scrolling over, and I just want to be clear,
18 that this is all DerEngel except for the "Okay"?

19 A. Yes.

20 MR. BOOKBINDER: Your Honor, could I just have
21 a moment?

22 THE COURT: Yes.

23 (Pause.)

24 MR. BOOKBINDER: No further questions.

25

1 CROSS-EXAMINATION BY MR. MCGINTY:

2 Q. Agent, you mentioned that nowhere on the TCN website
3 was the mention of the name "Ryan Harris." Do I
4 understand that correctly?

5 A. Um, I said I didn't recall seeing it in Brian
6 Harris's website.

7 Q. Now, you note on the website the book, "Hacking the
8 Cable Modem, What Cable Companies Don't Want You to
9 Know" is prominently featured, am I right?

10 A. That's correct.

11 Q. And you turned -- when you referred us to Page 2,
12 the copyright page, you indicated that on there it
13 indicated that the copyright for "Hacking the Cable
14 Modem" was "by Ryan Harris"?

15 A. That's correct.

16 Q. In his name, am I right?

17 A. That's correct.

18 Q. Um, again, the book sold on the website, am I right?

19 A. That's correct.

20 Q. And, um, you didn't mention that at the back of the
21 book there was this photograph of Mr. Harris, am I
22 right?

23 A. That's correct.

24 Q. And this book -- and I'm now putting it up on the --
25 the book is Exhibit 7. I'm simply putting up the back

1 page, the back cover, which if I can --

2 Now, on the back cover of the book, does it not
3 indicate: "Warning, the practice of modifying a cable
4 modem violates service agreements." Do you see that?

5 A. Yes, I do.

6 Q. "And hackers risk being banned for life by service
7 providers," does it not say that?

8 A. Yes, it does.

9 Q. "This book is not intended to be used for stealing
10 internet service or for any other illegal activity." Do
11 you see that?

12 A. Yes, I do.

13 Q. Now, when it talks about "the practice of modifying
14 a cable modem violates service agreements," you
15 understand that to mean that if someone modifies their
16 cable modem, it could be viewed by the cable company as
17 a violation of the contract between the user and the
18 ISP, am I right?

19 A. That's correct.

20 Q. And that what this book indicated was an awareness
21 that should you modify your cable modem, the beef would
22 be with the ISP in terms of the agreement between the
23 customer and the ISP, am I right?

24 A. That's what it would be -- yeah, that the statement
25 refers to.

1 Q. Did you notice at the bottom, perhaps a little bit
2 whimsy, but did you notice at the bottom it says "the
3 finest" -- if I could just blow that up a bit. (Blows
4 up.) And then you have "The finest in geek
5 entertainment."

6 Have you ever seen that before?

7 A. Um, yes, I have.

8 Q. Now, do you understand that, um, this book is
9 published by a publisher called "No Starch Press"?

10 A. That's correct.

11 Q. And you're familiar with "No Starch Press," are you
12 not?

13 A. I've heard of them, yes.

14 Q. Now, this book was available for sale in this store,
15 um, in California, right?

16 A. That's correct.

17 Q. And at this store, um, you at some point called this
18 store, and this was November 24th of 2008, am I right?

19 A. Um, I believe the date is correct.

20 Q. And on that date you spoke with a person named
21 "Ryan," am I right?

22 A. That's correct.

23 Q. But you at some point understood that that "Ryan"
24 was an employee of the store front not Mr. Harris, do I
25 understand that right?

1 A. Um, I never determined, um, which "Ryan" I spoke
2 with on the phone, but it's possible it was the employee
3 who worked at the store front.

4 Q. Right, because a subsequent search indicated that
5 there was another employee there with the first name
6 "Ryan," am I correct?

7 A. That's correct.

8 Q. Now, um, the store sold a lot of these books, did it
9 not?

10 A. Um, I personally did not visit the store, but it was
11 reported to me that it did.

12 Q. And also that the store sold various computer parts,
13 wasn't that reported to you?

14 MR. BOOKBINDER: Objection, your Honor.

15 THE COURT: Sustained.

16 Q. Did you learn anything -- and you were in
17 communication with the agents that were conducting the
18 search, am I right?

19 A. Um, after the search was conducted, I read their
20 reports.

21 Q. Right. Did you communicate with them directly about
22 what they learned about the store?

23 A. Um, one of the agents I did.

24 Q. Okay. And you -- when you say you learned it from
25 that agent, you had communicated -- you spoke to that

1 agent about what that agent had learned about the store,
2 am I right?

3 A. That's correct.

4 Q. And part of what you tried to do is integrate all of
5 the information that you could get relative to the
6 investigation, is that fair to say?

7 A. Um, that's fair.

8 Q. And you also reviewed photographs of the store, did
9 you not?

10 A. I did.

11 Q. There were photographs taken of the store, were
12 there not?

13 A. Yes, there were.

14 Q. And didn't the photographs indicate that there were
15 various computer parts sold at the store?

16 A. Um, I believe it did.

17 Q. And that the store had advertised itself as a
18 PC-repair-type shop, am I right?

19 A. Um, yes, it did.

20 Q. Now, when you purchased, um, the modems that you
21 talked about getting, which was the 5100 combo and the
22 4200, you were buying modified firmware, were you not?

23 A. I was buying modems that contained modified
24 firmware, correct.

25 Q. And you had done that purchase after you reviewed

1 the website to see what was offered, am I right?

2 A. That's correct.

3 Q. Because you were making a purchase off the website,
4 weren't you?

5 A. That's correct.

6 Q. And you wanted to make sure that whatever you got
7 was stuff that had the modified capability, am I right?

8 A. That's correct.

9 Q. You also saw on the website that there were items
10 for sale, modems for sale that were not modified?

11 A. I believe there were, um, one or two types of
12 modems, that were not modified that were offered for
13 sale.

14 Q. Now, um --

15 MR. MCGINTY: May I have a moment, your
16 Honor?

17 THE COURT: Yes.

18 (Pause.)

19 Q. Do you see the page --

20 THE COURT: Hold on a second.

21 MR. MCGINTY: This is in evidence. It's
22 Exhibit 2.

23 THE COURT: No, but we have to change the
24 device.

25 MR. MCGINTY: Oh, okay.

1 Q. This is Page 0208, and if I might highlight the
2 first item.

3 This is a Motorola SB-5101 cable modem. Do you
4 see that?

5 A. Yes, I do.

6 Q. And this is not the 5100 --

7 THE COURT: Hold on. Just a second. The
8 jurors may not --

9 Do the jurors have it?

10 THE JUROR: No.

11 THE COURT: There's something wrong with the
12 device then.

13 (Pause.)

14 THE COURT: Did it come up now?

15 THE JUROR: Oh, there it is.

16 THE COURT: I'm sorry. Has it come up on your
17 computer now?

18 THE JUROR: Yes.

19 THE COURT: All right.

20 Q. Now, this is not one of the items that you had
21 ordered, do I understand that right?

22 A. That's correct.

23 Q. And what this one indicates is that it comes with
24 default stock firmware non-modified, am I right?

25 A. That's correct.

1 Q. And the ones that you were purchasing were ones that
2 you intended to be modified and you purchased because
3 you understood they were modified, am I right?

4 A. I'm sorry. Could you repeat the question again?

5 Q. The ones you purchased were the ones you understood
6 were modified and you purchased them for that purpose,
7 am I correct?

8 A. Um, I purchased the most -- what was listed as the
9 most common product on the website, which I understood
10 to be modified, yes.

11 Q. Now, um, further down that page there is reference
12 to a modem which is an engineering prototype. Do you
13 understand this one as well to be a nonmodified cable
14 modem?

15 A. Um, the description here doesn't list it as being
16 modified or nonmodified.

17 Q. Now, that's different from the SB-4200 that you
18 bought which is identified as "custom," am I right?

19 A. Um, I'm sorry?

20 Q. The one you purchased is further down the page and
21 it's the "4200 custom"?

22 A. The modem I purchased was listed on the first page
23 of the website that had the -- it was listed under
24 "BlackCat combo." I'm not certain that this listing
25 here refers to that modem also.

1 Q. I see. But looking at the website, did you not see
2 a clear differentiation between things that were custom
3 and things that were nonmodified?

4 A. A clear distinction? No.

5 Q. Well, did you understand that the modified ones were
6 referred to as "custom" -- I'm sorry, that the
7 nonmodified ones, the vanilla Motorola modems were not
8 listed as "custom"?

9 A. The only thing I understood from reading the website
10 was that if a modem was nonmodified, it would be listed
11 as having -- either stating "nonmodified" or was listed
12 as having "default stock firmware."

13 Q. Now, um, the modem that you got or the modems that
14 you got, you understood functioned as -- well, could
15 function as ordinary modems, am I right?

16 A. The modems that I received could function as
17 ordinary modems? Yes, that's correct.

18 Q. So apart from whatever additional capability they
19 had, um, they would function in the ordinary course as
20 regular old modems if you use them for that purpose, is
21 that fair to say?

22 A. That's correct.

23 Q. Now, you had testified about certain chats, did you
24 not?

25 A. Yes, I did.

1 Q. And your testimony about the chats is that you had
2 gotten these from Craig Phillips's lawyer, do I
3 understand that right?

4 A. Um, yes.

5 Q. Now, you were not present when the chats were, um,
6 copied onto disks, were you?

7 A. Um, copied onto the DVD in which I received?

8 Q. Correct.

9 A. That's correct.

10 Q. You were not present when they may have been
11 originally copied from whatever source they were copied
12 from, do I understand that right?

13 A. That's correct.

14 Q. Did you ever ask Craig Phillips how it was that he
15 never copied chats between himself and anyone other than
16 Ryan Harris. Did you ever ask him that?

17 A. I referred to my reports and my interviews with
18 Craig Phillips and I don't recall that question
19 specifically.

20 Q. (Pause.) The person, Nathan Hanshaw, that has been
21 identified here as or has used the name "DShocker," did
22 you check to see whether he had any presence on the TCN
23 forums?

24 A. Um, yes, I did.

25 Q. And do you remember in your review of those that,

1 um, there were no posts under the on-line name
2 "DShocker"?

3 A. Um, that's correct, the name "DShocker" was listed,
4 but there were no posts attributed to him.

5 Q. And when you say the name was "listed," the name
6 appeared somewhere, do I understand that right?

7 A. That's correct, it appeared in the list of users
8 that --

9 Q. But you couldn't find any posts that had been
10 preserved with his name on it, do I understand that
11 right?

12 A. That's correct.

13 Q. All right. Now, you testified about your expertise
14 as an agent who, um, does computer-related
15 investigations, did you not?

16 A. Well, I wouldn't call it an "expertise," just the
17 field in which I work.

18 Q. You're being unnecessarily modest?

19 A. Perhaps.

20 Q. All right. Now, um, you're familiar with the use of
21 a MAC as a hardware identifier, are you not?

22 A. I am.

23 Q. And you're aware that the MAC as a hardware
24 identifier is collected by a lot of companies on the
25 internet for a lot of different reasons, am I right?

1 A. Um, again I'm not familiar with what companies
2 collect, but I know the MAC address is used for a number
3 of different functions.

4 Q. Right. Now, you've been present during the entirety
5 of the trial, have you not?

6 A. I have been.

7 Q. And you've been seated up here in the first row, am
8 I right?

9 A. That's correct.

10 Q. And I had made inquiry of a witness or you heard me
11 make inquiry about the use by Google, for example.

12 Now, you testified about Google, am I right?

13 A. That's correct.

14 Q. You testified about Google searches and what those
15 are, correct?

16 A. That's correct.

17 Q. And you testified about characteristics of Google
18 searches, am I right?

19 A. That's correct.

20 Q. Now, are you aware that Google uses MAC addresses
21 for purposes of its location services, its locator?

22 A. The only, um -- I'm not aware that --

23 Q. Yes or no, are you aware of that?

24 A. No.

25 Q. Um, are you aware that, among other things the

1 locator service does, is it compares MAC addresses sent
2 by users' devices, compares them with known MAC
3 addresses, and uses that to identify geo-coded
4 locations, in other words, longitude and latitude. Are
5 you familiar with that?

6 A. I'm familiar with geo-coded locations, that's
7 correct.

8 Q. But are you aware that they triangulate using MACs
9 captured from nearby devices so that Google can tell us
10 where a device is situated using MACs. Are you aware of
11 it?

12 A. Yes.

13 Q. Are you aware of sniffing tools such as "Wire
14 Shark"?

15 A. Yes, I am.

16 Q. "TCP Duck"?

17 A. Yes, I am.

18 Q. Are you aware that those can be used to capture MAC
19 addresses?

20 A. Yes, they can.

21 Q. Are you aware that these are part of -- that they
22 are a part of a family of "permissive-free software
23 licenses"?

24 A. "Permissive-free software licenses"?

25 Q. Yes.

1 A. I'm not familiar with that term.

2 Q. Are you aware that the license for "Wire Shark, VSP"
3 was used by the Berkeley Software Distribution. Do you
4 know what the Berkeley Software Distribution is?

5 A. Yes.

6 Q. It's a UNIX-like operating system, is it not?

7 A. That's correct.

8 Q. And are you aware that the license for Wire Shark
9 was used as part of that operating system?

10 A. Um, I was made aware of it during the course of the
11 trial.

12 Q. So you went and verified it, right?

13 A. Yes.

14 Q. So when I said it, you took it down, you went and
15 you checked it out, and it turned out to be the case,
16 right?

17 A. That's right.

18 Q. And did you check whether the original owners of VSP
19 were the Regents of the University of California?

20 A. No, I did not.

21 Q. But you are aware that those capabilities can be
22 used to capture MAC addresses?

23 A. Um, you're referring to the program Wire Shark?

24 Q. Yes.

25 A. That's correct.

1 Q. And you testified about the characteristic of
2 anonymity. Do you recall that testimony?

3 A. Yes, I do.

4 Q. One of the things that the TCN products made
5 possible was for a person to be anonymous on the net, am
6 I right?

7 A. That's correct.

8 Q. And there are lots of legitimate reasons why a
9 person would want to be anonymous on the net, am I
10 right?

11 A. Um, yes. Yes.

12 Q. Now, there are illegitimate reasons to be invisible
13 on the net, am I right?

14 A. That's correct.

15 Q. But a lot of people don't like their business out
16 there, am I right?

17 A. That's correct.

18 Q. Because their business may be their political
19 communication, am I right?

20 A. That's correct.

21 Q. In fear of a government that may do them harm, am I
22 right?

23 A. That's correct.

24 Q. They may also be concerned about business
25 communications that they don't want other people to know

1 about, am I right?

2 A. That's correct.

3 Q. There are industrial sabotage or commercial sabotage
4 firms that try to identify vulnerabilities to try to get
5 communications or divulge confidential information, am I
6 right?

7 A. Um, could you rephrase the question?

8 Q. There are firms that spy on other commercial firms,
9 do they not?

10 A. That is true. That's correct.

11 Q. And they try to penetrate communications at whatever
12 vulnerable spot they can find, am I right?

13 A. However they can get the information, I suppose.

14 Q. And one of the ways that a person might defeat that
15 is by using anonymity in their communications, am I
16 right?

17 A. That is correct.

18 Q. You testified about other ways that anonymity may be
19 obtained, am I right?

20 A. That's correct.

21 Q. "Anonymizer," am I right?

22 A. That's correct.

23 Q. Have you ever conducted an investigation to shut
24 down Anonymizer?

25 A. No, I have not.

1 Q. To bring it down, have you?

2 A. No, I have not.

3 Q. To put it in custody -- strike that.

4 MR. BOOKBINDER: Objection.

5 THE COURT: Yes, the jurors should disregard
6 that comment. Go ahead.

7 Q. As far as you know has there been any investigation
8 of Anonymizer.com?

9 A. To my knowledge, no.

10 MR. MCGINTY: May I have a moment, your
11 Honor?

12 THE COURT: Yes.

13 (Pause.)

14 MR. MCGINTY: I have no further questions of
15 this witness.

16 MR. BOOKBINDER: Your Honor, if we could have
17 a moment?

18 THE COURT: Yes.

19 (Pause.)

20

21 REDIRECT EXAMINATION BY MR. BOOKBINDER:

22 Q. When Mr. McGinty asked you about the name "DShocker"
23 and the -- um, with reference to the website, the TCNISO
24 website. Do you remember those questions?

25 A. Yes, I do.

1 Q. You were saying, I think, that his name appeared on
2 a list, is that right?

3 A. That's correct.

4 Q. But you didn't find any actual posts still sitting
5 on the website, posts by him?

6 A. That's correct.

7 Q. What was that list a list of?

8 A. Um, a list of users which had posted on the TCNISO
9 forums.

10 Q. So he was listed as someone who had posted, but
11 those posts just were no longer there in 2008?

12 A. That's correct.

13 Q. Mr. McGinty also asked you some questions about
14 something called "Wire Shark," is that correct?

15 A. Correct.

16 Q. And that's essentially a sort of sniffer program, a
17 publicly-available sniffer program?

18 A. That's correct.

19 Q. Um, as a law enforcement agent, are you able to use
20 Wire Shark whenever you want to sort of investigate
21 somebody, just get on the internet and use it?

22 A. Um, no, I'm not.

23 Q. What would you have to do if you wanted to use it?

24 A. Um, I would have to get a search warrant, I believe,
25 some type of a legal document.

1 MR. BOOKBINDER: No further questions.

2 MR. MCGINTY: I have no questions.

3 THE COURT: Thank you. Your testimony is
4 complete.

5 Does the government wish to present any additional
6 evidence?

7 MR. BOOKBINDER: No, your Honor, the
8 government rests.

9 THE COURT: And does the defendant wish to
10 present any evidence?

11 MR. MCGINTY: Your Honor, subject to a motion,
12 no, the defense is resting as well.

13 THE COURT: I'm not sure I understand that.
14 Are you talking about Rule 29?

15 MR. MCGINTY: Yes.

16 THE COURT: Okay.

17 All right. Ladies and gentlemen, that concludes
18 the evidence. So I'm going to send you home for today.

19 With regard to tomorrow, the weather forecast is
20 bad. As I understand, they've told you that if the
21 Boston public schools are delayed or canceled, then your
22 jury service is canceled for that day and you should
23 report Thursday. Hopefully that won't occur. I think
24 I'm going to let you sleep in a little tomorrow and have
25 you get here by 9:30 because I anticipate that although

1 I'll work with the lawyers today, they'll be some things
2 I'll need to discuss with them tomorrow and I want to
3 minimize if not eliminate your time waiting for us.

4 Although you've heard all the evidence, it's
5 especially important that you not discuss this case now,
6 among yourselves or with anybody else, or begin to make
7 up your minds individually. Until you hear the closing
8 arguments and perhaps especially my jury instructions --
9 well, until you hear the jury instructions, you can't
10 know what the relevant questions are or what standards
11 you're required to use in answering those questions.

12 So just continue to keep an open mind. Don't
13 discuss the case among yourselves or with anyone else.
14 Don't read, watch or listen to anything about the case.
15 Don't do any research on the internet or elsewhere. And
16 don't communicate about the case on the internet or any
17 other social media. I hope and expect that the weather
18 will let us proceed tomorrow.

19 You'll hear the closing arguments of the parties,
20 then I'll give you my final instructions, then you'll
21 begin your deliberations. So you need to plan to be
22 here tomorrow afternoon. I don't know how long the
23 deliberations will take, but you should plan to be here
24 at least until about 4:30. If your deliberations are
25 not complete, you'll have to let me know whether you

1 want to go home and return on Thursday or whether you
2 want to keep working. That will be up to you.

3 So I will excuse the jurors and meet with
4 counsel. The Court is in recess for the jury.

5 (Jury leaves, 10:30 a.m.)

6 THE COURT: All right. With regard to my
7 **Petrozziello** rulings, I find that the government has
8 proven by a preponderance of the evidence that Phillips,
9 Lindquist, Mr. T, and MooreR were each members of a
10 conspiracy that included Mr. Harris, um, at the time
11 they made the statements conditionally admitted and that
12 those statements were made in furtherance of a
13 conspiracy. Um, therefore that evidence is finally
14 admitted.

15 Mr. McGinty, is your Rule 29 motion in writing or
16 oral?

17 MR. MCGINTY: It is.

18 THE COURT: It's in writing. All right. Oh,
19 I'm sorry. Do you, by any chance, have two copies for
20 me? If not, I'll get it copied.

21 (Passes up.)

22 MR. MCGINTY: I have three.

23 THE COURT: Actually, here, give the two to
24 the government and I'll make it. No, here, go ahead.
25 You take it.

1 It's now about 10:35. I'd like to read this. So
2 why don't you plan to return at 11:00. I'll hear your
3 argument. We'll have some discussion about the jury
4 instructions and about the closings. Okay?

5 The Court is in recess.

6 MR. MCGINTY: Your Honor, perhaps for the sake
7 of formality, I should say on the record that the
8 defendant has submitted a written Rule 29 incorporating
9 the arguments, challenging the sufficiency of the
10 government's proof, and that the contents of the
11 arguments set out in the attached filing, um, I submit
12 this for purposes both of the Rule 29 at the conclusion
13 of the government's proof as well as after the defendant
14 has rested.

15 THE COURT: Okay. And here, have a seat. Let
16 me ask the following just again to sort of button things
17 up. I was told and the government was told on Sunday by
18 counsel that Mr. Harris did not wish to testify. Of
19 course that's his right. But I'd just like to ask him
20 and confirm that he knows he has the right to testify
21 and that's his decision.

22 Mr. Harris, do you understand that you had a right
23 to testify in this case, if you wanted to, and also a
24 right not to testify?

25 THE DEFENDANT: Yes, I did.

1 THE COURT: And did you discuss with
2 Mr. McGinty whether you wanted to testify?

3 THE DEFENDANT: Yes, I did.

4 THE COURT: And did you, after consulting him,
5 decide not to testify?

6 THE DEFENDANT: That is correct.

7 THE COURT: And are you fully satisfied with
8 his work as your lawyer in this case?

9 THE DEFENDANT: Extremely.

10 THE COURT: Okay.

11 All right. I think that does it. We'll come back
12 at 11:00. The Court is in recess.

13 (Recess, 10:45 a.m.)

14 (Resuming, 11:20, a.m.)

15 THE COURT: Okay. I've read the Rule 29
16 motion and given it some thought. I'm interested in
17 hearing the argument particularly with regard to
18 conspiracy. I may reserve on the wire fraud. But we'll
19 see.

20 But at the moment I'm inclined to grant the Rule
21 29 motion with regard to the conspiracy charge. It
22 appears to me, applying the standards I used in **DiMasi**,
23 that there's insufficient evidence, even when viewed in
24 the light most favorable to the government, to prove the
25 conspiracy the government said it would prove, which is

1 one in which the Massachusetts buyers, um, brought an
2 overarching conspiracy. There's a lack of
3 interdependence.

4 I think that -- at the moment, that there's
5 insufficient evidence to prove a conspiracy with any one
6 of them. Mr. -- I don't think there's any evidence that
7 Mr. Harris communicated with or knew Larosa or Madeira.
8 It's true that -- I think if there was a conspiracy with
9 any one of the people in Massachusetts, it probably
10 wouldn't be an impermissible variance. There are a
11 number of cases that say the defendant's not prejudiced
12 when a narrower conspiracy is proven and here the
13 evidence would have been admissible on the wire fraud
14 charges anyway. So there's not evidentiary spillover
15 that's impermissible.

16 But, as I understand the evidence, there's none
17 that Mr. Harris knew Larosa or Madeira, um, and while
18 it's true that you don't have to know all of your
19 co-conspirators, I think to get venue in Massachusetts,
20 based on Larosa or Madeira, it would have to be proven
21 that Mr. Harris, you know, knew of their existence and
22 tended to agree with that. That's my current state of
23 mind.

24 With regard to Mr. Hanshaw, there were
25 communications between Harris and Hanshaw, including

1 some discussion that Mr. Harris, you know, would pay
2 Mr. Hanshaw something if he were able to fix some
3 problem, but mere discussion of a crime's not a
4 conspiracy, and Phillips testified that Mr. Harris told
5 him that Hanshaw was an idiot and he shouldn't deal with
6 him and Hanshaw again testified that, you know, to the
7 fact that Harris didn't want to deal with him, he kept
8 kicking him off the forums. So at the moment I doubt
9 that there's evidence sufficient to prove that
10 Mr. Harris and Mr. Hanshaw were in a conspiracy.

11 The -- there's ample evidence to prove that
12 Harris, Phillips, Lindquist, MooreR, and Mr. T were in a
13 conspiracy, at some point, but Phillips and Lindquist
14 left by -- in or before 2007, and then the only overt
15 act in Massachusetts would be the 2008 downloading of --
16 by Agent Ryan. So I doubt that the jury could find an
17 overt act in Massachusetts.

18 So that's my current tentative thinking on the
19 conspiracy charge.

20 Since I'm leaning toward the defendant, does the
21 government want to be heard first?

22 MS. SEDKY: Your Honor, we understand the
23 Court's ruling and we have nothing further to add.

24 THE COURT: All right. So I'm granting the
25 Rule 29 motion on the conspiracy charge.

1 The defendant's motion on the wire fraud, I'm
2 interested in hearing argument on, um, but it, to some
3 extent, I think -- well, I gave you my **DiMasi**
4 instructions back in December on wire fraud and, um, I
5 think one thing -- one place where the defendant's view
6 is different than what I've instructed before and I'm
7 inclined to instruct again, with regard to the wires, is
8 that if Mr. Harris is proven to have devised or
9 participated in a scheme to defraud, it will have to
10 be -- and with intent to defraud, um, it's going to have
11 to be proven that he transmitted or caused to be
12 transmitted the wire communication in question for the
13 purpose of furthering the scheme. And that, I would
14 tell the jury, as I did in **DiMasi**, in effect, that it's
15 "not necessary to prove that the defendant personally
16 executed the wire transmissions, rather it's enough if
17 the government proves that the defendant caused the wire
18 transmission to occur by doing some act from which it
19 was reasonably foreseeable that the wires would be
20 used," and that's **Pimental**, 380 F.3d 575 at 584, **Sawyer**,
21 239 F.3d 31, at 39 to 40, **Silvano**, 812 F.2d 754 at 760,
22 **Moreau**, 39 F.3d 1228, at 1237, and the First Circuit
23 pattern instruction 4.18.1343. Another way to state
24 that is I might tell the jury that: "If it is proven
25 that Mr. Harris participated in the alleged scheme and

1 did something relating to it which he knew or reasonably
2 could foresee would result in the acquisition of
3 internet service without payment to an ISP, the jury may
4 find, if interstate wires were involved, that element
5 would have been proven." Something like that.

6 So that's, you know, my -- that's one of my
7 current thoughts on that.

8 But, Mr. McGinty, do you want to address the mail
9 fraud?

10 MR. MCGINTY: I do, your Honor. And just
11 referring to that last instruction, um -- and if he was
12 -- if it was proven participation in a scheme and the
13 defendant did something related to the scheme, um, which
14 related to the obtaining of internet service without
15 paying, now, the jury has got to evaluate --

16 THE COURT: Well, let me just -- the important
17 part of that -- well, let me just explain. I think what
18 I just said, rooted in those cases, is an accurate
19 statement of the law. That's one. Two, what that means
20 is, and my current conception, is he doesn't have to
21 know Mr. Larosa -- whether Mr. Larosa used his hardware,
22 the defendant's hardware and software, to steal internet
23 service, it would be enough if he reasonably foresaw
24 that somebody like Mr. Larosa, you know, who bought the
25 hardware and software, if he bought both, you know, um,

1 would do that and, in fact, Mr. Larosa did do it. At
2 the moment that's what I think is an accurate or correct
3 statement of the law.

4 MR. MCGINTY: Well, I differ because that
5 would suggest that the character of the hardware or the
6 software and the sale of it by Harris would be
7 sufficient to anticipate, um, that the ultimate user
8 would use it in a particular fashion.

9 THE COURT: And conceivably -- and I'm not
10 going to, at the moment, instruct -- well, I don't
11 intend to instruct that it would be sufficient. I think
12 in some cases it could be. If it had only one use --
13 and I think you have evidence that there were multiple
14 uses, but as a general matter, if it had only one use
15 and that were proven, you know, then you could -- you
16 know, then they could. But there's evidence, you know,
17 of more than selling the devices here.

18 MR. MCGINTY: Well, there's evidence of
19 selling the device, there's evidence of the device's
20 capability in terms of a couple of or a handful of
21 chats, but in terms of the fundamental capability -- and
22 Isabella Lindquist talked about it's diagnostic
23 capability, but the agents acknowledged that, among
24 other things, it provided for anonymity, it provided for
25 changes in packet size, filters, and, um, that it could

1 be used to resist cable throttling, which we got from
2 the -- from Mr. Kohler. In other words, there's a host
3 of things this thing makes possible. The government
4 puts in what it views as incriminating statements
5 relative to one of the capabilities, but that doesn't
6 exclude the others.

7 THE COURT: It doesn't, but I have to look at
8 the evidence in the light most favorable to the
9 government right now. So the jury could reasonably find
10 that Mr. Harris said, "I'm the creator of internet
11 hacking. We're going to take on the greedy internet
12 companies," intent to defraud, you know, "get their
13 money -- get their services without paying for it," the
14 jury could reason, "and here are the devices that I've
15 developed, I've sold, I've instructed you on how to use,
16 so go do it."

17 MR. MCGINTY: Well, were this a situation
18 where the government's evidence was uncontested, and the
19 testimony was that this was a single-use item, um, then
20 that's one thing. Where the government witnesses, in
21 part, say "single use," but yield on a balance of other
22 uses that are entirely permissible, including uncapping
23 under certain circumstances, then how does the Court
24 tell the jury that the evidence is satisfactory to
25 permit an instruction about single use and whatever

1 inferences may arise from single use?

2 THE COURT: Well, I don't --

3 MR. MCGINTY: So if I understand **DiMasi**, if I
4 understand the Court's instruction in **DiMasi** --

5 THE COURT: Well, I don't --

6 MR. MCGINTY: I mean, it seems like the
7 sufficiency and the instructions sort of go hand and
8 hand.

9 THE COURT: Well, no, that's definitely true.

10 MR. MCGINTY: And as I understand the **DiMasi**
11 instruction is that if the government gets an
12 unequivocal proposition, "It's a bad thing," and it's
13 not met and mitigated in some fashion, they get the
14 "It's a bad thing" instruction and --

15 THE COURT: Well, they're going to get an
16 instruction along the lines that the mere -- my present
17 inclination is to instruct along the lines of -- well,
18 wait a minute.

19 (Pause.)

20 THE COURT: That "The mere sale of the
21 product" -- something along the lines that "The mere
22 sale of the product is not," or these products, "is not
23 proof of a scheme to defraud, but, you know, any proven
24 nature of the products can be taken into account in the
25 jury's decision as to whether a scheme to defraud, um,

1 has been engaged in, whether Mr. Harris devised or
2 participated in a scheme to defraud," and then you'd
3 argue about the implications of the evidence that they
4 heard about, the various uses. But if the jury is
5 persuaded that the primary, if not exclusive, use of
6 Sigma or BlackCat was to, um -- or the primary exclusive
7 intended use of Sigma or BlackCat by Mr. Harris was to
8 steal internet service, um, then they can take into
9 account the nature of the crime.

10 MR. MCGINTY: Well, I mean, doesn't this lead
11 to anomalous results? For example, if the primary
12 purpose -- if the jury takes into account the primary
13 purpose and views it as stealing service and the Court
14 instructs that you could take into account that primary
15 use in evaluating whether Harris is culpable for
16 participation in a wire fraud with Mr. Larosa, even
17 though Harris doesn't have to know Larosa and he, um,
18 doesn't -- and it's sufficient if Harris merely foresaw
19 that someone like Larosa would use it -- Larosa could
20 get it as a doorstep.

21 THE COURT: Could get it where?

22 MR. MCGINTY: As a doorstep. Larosa could
23 have gotten it because he liked "Popular Mechanics" and
24 wanted to pry it open. It could be that he's a geek and
25 just wanted to check into it. But on that instruction

1 Larosa's use of the object would be irrelevant to
2 evaluate whether Harris was in a scheme to defraud with
3 him --

4 THE COURT: Well, that's the point, that's
5 where I think you confused, conflated -- respectfully,
6 confused and conflated conspiracy with wired fraud. And
7 it may be -- and now I'm talking about convicting
8 Mr. Harris as a principal of wire fraud and not aiding
9 and abetting, and we get into that more nuanced area
10 whether you can aid and abet somebody you don't know.
11 But now I've heard all the evidence and I think the
12 government's strongest possible case is on Mr. Harris as
13 a principal, um, that he devised this scheme, "I'm the
14 creator, I invented, you know, internet hacking of
15 modems. We want to deprive these greedy ISPs of the
16 money they're hoping to earn. The war is on."

17 So, you know, that -- you know, viewed in the
18 light most favorable to the government, there's ample
19 evidence to prove that beyond a reasonable doubt, and
20 then it's your contention these devices had many
21 possible indeed intended uses, the government's
22 contention is, and the evidence would be sufficient to
23 support it, that it had -- that some of these items had
24 a single intended use by Mr. Harris and that was to
25 steal internet service, um, and, you know, it's what you

1 argue to the jury.

2 MR. MCGINTY: Well, I'm arguing it against an
3 instruction that arguably is at odds with itself, it
4 talks about how product capability alone is not
5 sufficient and then says that so long as the capability
6 was of this nature, um, it's immaterial whether he knew
7 who got it or what the person did with it. So to me
8 these --

9 THE COURT: Have you read those cases that
10 I've -- that you saw there? You could have seen they
11 were cited -- well, maybe Ms. Demaso could have, because
12 you've been busy, you know, and you have a very
13 satisfied client, but that that's what the law is.

14 MR. MCGINTY: Well, the law doesn't say that
15 the scheme to defraud exists independent of the, um --
16 of the effect on the intended victim. Now, you don't
17 have to prove injury to the intended victim, but no case
18 says that you don't have to know that there doesn't have
19 to be an intended victim who is the intended object of
20 the scheme. I mean, a scheme has got to have
21 definitional parameters to it. And what I'm hearing
22 from the Court is --

23 THE COURT: Well, if you have a scheme -- why
24 can't you have a scheme to defraud every ISP in the
25 country or in the world, what would be the legal flaw?

1 MR. MCGINTY: Well, based on product
2 capability alone.

3 THE COURT: You can keep saying it, but that's
4 not what I'm going to instruct them on. Maybe you don't
5 hear me, maybe you don't understand me, but I don't
6 think we ought to keep going back and forth on that.
7 And I will tell you, um, tomorrow morning, you know, now
8 that I know the conspiracy is out, I'll have to revise
9 what I tentatively thought I might say about **Direct**
10 **Sales** and that line of cases and I'll tell you, before
11 you argue, what I propose to say and I'll listen to you
12 and I might refine it. But, you know, maybe if you
13 genuinely don't understand what I'm saying, which is
14 consistent with what I gave the jury in my preliminary
15 instructions, you can talk about it with Ms. Demaso.

16 MR. MCGINTY: Well, I, um -- your Honor, I
17 think the word's "disagree," I disagree with the Court's
18 instruction on this. I would respectfully say that the
19 Court's instruction at the beginning of the case, um, is
20 at variance with this, um, because it referred to
21 knowledge how a product would be used.

22 THE COURT: Right. Well, let me see what I
23 said.

24 MR. MCGINTY: If the proof is indifferent to
25 who used it and how, then I don't understand how that

1 instruction stands. And that it would be used imports a
2 knowledge that the scheme was for the purpose of the
3 user and acknowledges how the user was going to use
4 this.

5 THE COURT: Actually, I -- you know, **Pimental**,
6 for example, said Judge Gertner correctly instructed --
7 "It was simply the use of the mails," in that case, "in
8 the course of the scheme rather than the particular
9 mailing at issue that must be reasonably foreseeable for
10 the causation element of the mail fraud offense." "The
11 principle, that is, the use of the mails rather than the
12 specific mailing that is charged that must be reasonably
13 foreseeable as a result of the scheme," is affirmed by
14 one of the primary cases on which **Pimental** relies, and I
15 have previously cited to you the same, or at least some
16 of them, **Sawyer**, **Moreau** and **DiMasi**.

17 But, you know, this is useful for two purposes.
18 I'm listening to you and I'll work on the jury
19 instructions, I'll try to get them accurate and complete
20 and balanced, and, you know, as always I don't want you
21 to be reasonably mistaken about what I'm going to
22 instruct the jury on and argue some theory that will be
23 defeated by the instructions.

24 You can argue, you know -- well, what does the
25 government say about wire fraud?

1 MS. SEDKY: Your Honor, we believe that, um --
2 we agree with everything in the Court's assessment of
3 what we're required to prove about what Mr. Harris's
4 level of intent was. He has to have intended to
5 defraud, that intent he has to have. He has to intend
6 to participate in a scheme to defraud. Each individual
7 wire doesn't even have to successfully accomplish the
8 intended goal. Nothing -- no fraud ever has to take
9 place. So he doesn't have to have any mens rea about
10 the specifics of a particular wire, the wire has to be
11 done reasonably foreseeable to him. It doesn't even
12 have to be actually foreseeable, it has to be reasonably
13 foreseeable.

14 THE COURT: He doesn't have to have actually
15 known about it, he has to have reasonably foreseen that
16 --

17 MS. SEDKY: Correct, it's an objective test
18 not a subjective test and he does not have to know any
19 specifics about the wire. There's no case law that I'm
20 aware of where he has to -- where the person who has
21 devised and/or is participating in the scheme needs to
22 know specific -- which specific ISP receives the wire.
23 No ISP has to receive the wire.

24 THE COURT: Well, if there are, for example,
25 mail fraud schemes where somebody is seeking to defraud

1 an insurance company and knows that he'll get the checks
2 from the insurance company in the mail and you don't
3 know who's going to send the checks and you don't know
4 when they're going to be sent, but it's reasonably
5 foreseeable that the mails will be used in furtherance
6 of the scheme by some unknown person. I think that's --
7 that principle I feel comfortable with.

8 I almost hate to ask this -- well, I don't hate to
9 ask this question, but I think there's an issue that you
10 all haven't addressed that we need to think about. It's
11 no in the Rule 29 motion.

12 What's the evidence that the wires -- well, two
13 things. I'm curious about the evidence on each
14 particular wire.

15 But what's the evidence that whatever wires were
16 used were interstate wire transmissions?

17 MS. SEDKY: That's a good question, your
18 Honor. We elicited testimony from each of the users
19 about physically where they were located at their
20 computer at the times that they both acquired the -- the
21 -- they went to the TCNISO website and that website --
22 from Massachusetts, and these internet wires travel
23 interstate, they were sitting in Massachusetts --

24 THE COURT: How do I know they went
25 interstate?

1 MS. SEDKY: Um, well, Mr. Harris was in either
2 San Diego, Arizona, um, or, I believe, Portland or Hong
3 Kong at the time that he eventually gets the order, and
4 then that's for the acquisition wire.

5 THE COURT: Yeah. You know, the question I
6 have is if this had been a telephone call, I would have
7 felt very comfortable, and you may be right, so the --

8 Does it matter where the site was hosted? I don't
9 think I heard the testimony I expected that the website
10 was hosted in Arizona.

11 MS. SEDKY: I think we got that in. But if he
12 -- in order to have the product fulfillment take place
13 -- and you heard Hanshaw downloaded it, and so he got
14 it, the others bought it and it was shipped to them. So
15 we do know where Harris was.

16 THE COURT: So all of this, you say, the
17 evidence is sufficient to prove is done through cables?

18 MS. SEDKY: Through the internet.

19 THE COURT: Yeah, I know, through the
20 internet.

21 MS. SEDKY: Right.

22 THE COURT: But what makes the internet an
23 interstate wire transmission. I started to look at this
24 before the trial, but --

25 MS. SEDKY: We -- I believe in our memorandum

1 in support of the jury instruction, I'm not sure if we
2 cited a case to it, but we, in our proposed instruction
3 for wire fraud, we put in internet as a definition of
4 the wire.

5 THE COURT: I know, but -- and I asked my law
6 clerk before the trial started, while I was doing my
7 preliminary instructions, to give me a current version
8 of Section 1343, because the mail fraud statute, 1341,
9 has been amended to use private carriers like Federal
10 Express. But as far as I know, 1343 --

11 MS. SEDKY: I am very happy to provide the
12 Court with authority.

13 THE COURT: I really wish you would.

14 MS. SEDKY: I believe it's, um -- well, let me
15 just make sure it's not in our --

16 THE COURT: Well, maybe it is.

17 MS. SEDKY: I believe it's, um --

18 THE COURT: Where is it? What document are
19 you looking at?

20 MS. SEDKY: Actually, um, we put it in the
21 end, I think. I don't think that's the -- um, I
22 apologize. If the Court will give me 25 seconds, I have
23 it in my Ipad and I can get you the cite.

24 THE COURT: Go ahead.

25 MS. SEDKY: It might take me longer than 25

1 seconds.

2 THE COURT: That's fine.

3 (Pause.)

4 MS. SEDKY: I'm sorry, your Honor. Rather
5 than take up the Court's time, this will take me 25
6 seconds when I get back to my office.

7 THE COURT: Hold on just a minute.

8 (Pause.)

9 THE COURT: Yeah, I don't see it quickly
10 looking at the government's -- I mean, I literally -- I
11 mean, how does the internet work? Did Mr. Harris have
12 to be on --

13 MS. SEDKY: The case law will, I believe, um,
14 give --

15 THE COURT: Did he have to be on a cable or is
16 my FIOS a wire?

17 MS. SEDKY: I guess it is.

18 THE COURT: Well -- all right.

19 MS. SEDKY: E-mail -- I will absolutely
20 satisfy the Court that the case law is very solid that
21 e-mail and internet is the use of the interstate wires
22 and especially in this case where we have that the
23 product fulfillment took place in another state. Um, it
24 had to have made its way. And that the use of the --

25 THE COURT: I know, but I thought I might hear

1 some testimony on this from Mr. Ryan or somebody. Maybe
2 it's okay. Maybe it's not. Well, I mean, because I
3 guess Phillips testified that they hooked up the cables
4 in California, I think.

5 MS. SEDKY: He testified that the website for
6 an extended period was hosted by GoDaddy. GoDaddy is
7 based in Arizona.

8 THE COURT: I don't -- did anybody testify to
9 that?

10 MS. SEDKY: No, not to my knowledge.

11 THE COURT: Yeah, that's what I'm talking
12 about.

13 (Pause.)

14 MS. SEDKY: Right. I think that the way the
15 logic goes is Mr. Harris had to have received
16 information through the wire. Because he was located in
17 California, there was no way for him to have gotten the
18 information. There was no phone call. There was no
19 mail in the order. The only way he got the information
20 was through the internet. And we will certainly find
21 case law that says that electronic communications
22 through the internet is a wire communication within the
23 meaning of Section 1343.

24 THE COURT: Well, get it to me as soon as
25 possible.

1 MS. SEDKY: I will do that. I apologize, your
2 Honor.

3 THE COURT: Within an hour after we suspend
4 because I have to write my instruction.

5 MS. SEDKY: No problem, your Honor.

6 MR. MCGINTY: Your Honor, if I might?

7 First of all, I would orally like to amend Rule 29
8 to include this ground. Secondly --

9 THE COURT: Yeah, it's a pretty good one.

10 No, look, it's just -- I've got to give jury
11 instructions and I'm going to, you know, continue to
12 work hard to get them right and, um, I'm not trying to
13 help one side or the other, but --

14 MR. MCGINTY: I want to sort of revisit the
15 issue of the instruction because I think it is critical
16 and I think the Hanshaw, um, situation sort of puts it
17 in perhaps a slightly different contrast.

18 When the Court talks about the "proven nature,"
19 um, the "proven nature" suggests that there's some proof
20 that the government put in sufficient to support the
21 nature being improper or illegal.

22 THE COURT: Um, there is. Viewed in the light
23 most favorable to the government, there's plenty of
24 evidence of that.

25 MR. MCGINTY: Right. And focusing on **DiMasi**,

1 which seemed to suggest that if the government's
2 evidence is undermined -- is undermined in a fashion
3 that contests that, the government's responsibility is
4 to address that or they lose the presumption that the
5 facts are sufficient to support the --

6 THE COURT: No, I don't think they lose the
7 presumption, I think you just have to look at all the
8 evidence and not just some of it. But the government --
9 um, the jury could disbelieve the answers you elicited,
10 that there are other uses.

11 MR. MCGINTY: It was their witnesses.

12 THE COURT: It doesn't matter. It doesn't
13 matter who called the witness. That's one.

14 Two, the jury could say, "These devices
15 theoretically could be used for other purposes, but, you
16 know, we see what Mr. Harris said and his intent was
17 that they be used to steal internet service." Okay?
18 There's ample evidence for the jury to find that beyond
19 a reasonable doubt.

20 MR. MCGINTY: And on that determination is the
21 Court's view that it's got to give instructions
22 sufficient to support that as a predicate for
23 conviction.

24 THE COURT: Yes.

25 MR. MCGINTY: Then --

1 THE COURT: Well, if it's proven that -- that
2 he developed these products, that he distributed them,
3 that he taught people how to use them as part of a
4 scheme to defraud, if that's proven beyond a reasonable
5 doubt, and the other elements are proven, they can
6 properly convict him.

7 MR. MCGINTY: And that would be strict
8 liability irrespective of how the recipient of it uses
9 it, if I understand it correctly.

10 THE COURT: No, it would have to be -- no,
11 because the use would have to be in furtherance of the
12 scheme. It would have to have been a reasonably
13 foreseeable use that Mr. Larosa did it to get service or
14 faster service without paying for it.

15 MR. MCGINTY: Right. But is that irrespective
16 of how Larosa actually used it or irrespective of how
17 Madeira actually used it?

18 THE COURT: No, they would have to -- no, if
19 Mr. Larosa just got it, because he was a geek and -- or
20 he saw it on the internet and he thought it was pretty,
21 um, he wouldn't have used it to send any wire, he just
22 would have kept it on his desk.

23 MR. MCGINTY: Right.

24 THE COURT: And then -- if that's the only
25 thing that Larosa did -- if he downloaded it -- well, we

1 would have to get to -- we would have to think this
2 through, but --

3 MR. MCGINTY: Let's change this to Madeira.
4 Madeira doesn't get a config file, he doesn't try to get
5 a MAC address, he plugs it in, um, he says it works, um,
6 there's no indication of what the significance is of
7 plugging in two modems at the same time. So for all the
8 jury could reasonably infer, um, the thing operated
9 because, um, the stringing of the modems together didn't
10 affect his service in any which way and he simply got
11 the service.

12 Now, if Madeira makes some misrepresentation,
13 because he doesn't change the MAC, he doesn't change the
14 config, is Harris potentially culpable for a wire fraud
15 with Mr. Madeira who didn't do anything inconsistent
16 with the interests of the internet service provider?
17 It's quite apart from the issue of the identification of
18 the --

19 THE COURT: He doesn't change the MAC?

20 MR. MCGINTY: He doesn't change the MAC, he
21 doesn't change the config file, he does nothing except
22 plug it in and "wallah" it works.

23 THE COURT: And he gets free service?

24 MR. MCGINTY: No, he gets service. He gets
25 service. But on the government's theory, he couldn't

1 get service because he didn't change the MAC, he didn't
2 change the config file. So he gets service and what
3 appears to be the case is in plugging it in, it didn't
4 disrupt his paid service, which was what he was getting.

5 So Madeira takes the thing, he plugs it in, now we
6 don't know exactly what he did with it, but he doesn't
7 change anything and he doesn't misrepresent doing
8 anything. So on those facts is the knowledge that
9 Harris has of the character of what he's selling,
10 because he -- because people talk about it, they say it
11 could be used this way, and Harris even acknowledges it,
12 I mean, all the background noise about what the
13 capabilities are, um, combined with the fact that it has
14 other possible uses, but is it sufficient on the nature
15 of the thing -- and I call it "product capability," but
16 the Court calls it -- but on the nature of the thing to
17 convict, even though Madeira didn't use it for
18 impermissible purposes?

19 THE COURT: Well, this is part of the reason
20 I'm going to reserve judgment on the Rule 29 motion with
21 regard to wire fraud at least until after I hear the
22 closing argument because what I haven't done, and I
23 don't know if it would be a profitable use of our time
24 today, to -- but what I haven't done is gone count by
25 count.

1 MR. MCGINTY: Could I make a suggestion on
2 it? Let's take Hanshaw, for example.

3 Hanshaw is, by his own admission, a social
4 engineer. What he does is he insinuates himself into
5 the confidence of people so that he can get confidential
6 information, and the confidential information he wants
7 isn't Harris's product, he wants the code. Now, you
8 don't need the code to hook up to the internet, the code
9 functions differently.

10 Now, it happens that, um, Mr. Hanshaw is familiar
11 with a fellow named "Furksa" and what Furksa does is
12 Furksa takes Harris's software and he either clones it
13 or works with it or changes it in a way where he can
14 make it useful in some other way. We also know that
15 Hanshaw had other access to the internet because he both
16 war drove, going around looking for exposed WIFIs, he
17 also used cloned modems that he got from Max Fraud. So
18 we don't have evidence sufficient to show that he used
19 the cable modem for the purposes --

20 THE COURT: This is what I need to --

21 MR. MCGINTY: Well, can I go just one more
22 point?

23 THE COURT: Go ahead. Yes.

24 MR. MCGINTY: Hanshaw is acting at variance
25 with the commercial interest of TCNISO, which is trying

1 to sell modems and make a profit on the sale of modems.
2 So he is on a private, um, wire with Isabella Lindquist
3 making a deal with her for the \$100 in order that he
4 gets the code and in each instance he gets the code for
5 purposes that aren't consistent with the interests of
6 Mr. Harris. So what we have here is a scheme, let's say
7 --

8 THE COURT: But this is where you're
9 conflating again conspiracy and wire fraud. For
10 conspiracy, they would need a meeting of the minds. Not
11 for wire fraud.

12 MR. MCGINTY: But for participation in a
13 scheme, his scheme, the sale for profit, Hanshaw's
14 scheme --

15 THE COURT: No, I don't see the scheme as
16 primarily or exclusively sale for profit, the scheme is
17 to steal service without paying for it from internet
18 companies.

19 MR. MCGINTY: Well, that's not, I would
20 respectfully submit, what's charged, um, and not only
21 that but, um, it would seem as if -- for there to be a
22 scheme to defraud where Harris is the principal and
23 there's a particular defendant -- and the Court asked
24 before, "Can you have a scheme that's inclusive of every
25 ISP," in the preparation of, let's say, a one-trick

1 pony, um, "for purposes of generalized fraud against
2 ISPs?"

3 You have Count 1, um, the use of the wire in
4 connection with a generalized wire fraud against
5 everyone in the world who happens to be an ISP. That's
6 one thing. Here the claim is -- the scheme to defraud
7 is for purposes of effecting a scheme, a scheme here
8 identifying as -- as, um, in the indictment --

9 Judge, I had it here a moment ago.

10 -- for the purpose of executing a scheme to
11 defraud and aiding and --

12 THE COURT: You're going too fast.

13 MR. MCGINTY: I'm sorry.

14 A scheme -- to defraud and obtain money, but a
15 scheme was devised: "For the purpose of executing a
16 scheme to defraud and aiding and abetting others to do
17 so as set forth below particularized by Hanshaw
18 downloading, Count 2, Hanshaw downloading, Count 3,
19 Hanshaw using, Count 4, Hanshaw Using, Count 5."

20 THE COURT: Okay.

21 MR. MCGINTY: So based on the product -- I'm
22 sorry, the nature of the product -- and I keep saying
23 "capabilities," because I don't know the difference, um,
24 and the Court has used the primary purpose and has
25 talked about the nature --

1 THE COURT: No, it's -- the nature of the
2 product is only evidence of a couple of relevant things,
3 one, did he have intent to defraud? It's evidence, but
4 not proof, if they find that its sole or primary purpose
5 is to steal internet for free, it's evidence of whether
6 there's a scheme. A scheme, you know, at some point --
7 is to defraud or is a plan to cheat somebody out of
8 something. If you devise software that's going to
9 operate -- that can operate to cheat people, it's
10 evidence, it's not proof, they can consider it with all
11 the evidence.

12 MR. MCGINTY: But I thought I asked whether a
13 scheme could consist of proof of the product
14 irrespective of the customer's use, and I understood the
15 Court to say "Yes."

16 THE COURT: Well, actually you can.

17 MR. MCGINTY: And it's resting on --

18 THE COURT: No, this is part of -- I discussed
19 this with you before, it was big in or it was relevant
20 in *DiMasi*. And in *Potter*, you know, there was a scheme
21 to bribe a Rhode Island state legislator by making
22 payments to his law firm, the legislator didn't know
23 about it, and apparently the money didn't get to Potter,
24 as I recall. But the racing interests that were making
25 the payments for that purpose had the scheme and they

1 used the mails in furtherance of the scheme.

2 MR. MCGINTY: But in Potter's case, um, the
3 scheme doesn't have to be successful, but it was for the
4 purpose of achieving that objective. And here you're
5 saying that the proof can be satisfied by no proof that
6 the scheme was going to be achieved at the far end by
7 the person who was going to get the money. And here
8 there's no proof that --

9 THE COURT: They could have -- some crimes
10 are -- somebody could get arrested and convicted on mail
11 fraud before anybody was actually defrauded. It focuses
12 on devising the scheme and using, in this case, the
13 wires, the interstate wires in furtherance of the
14 scheme. It doesn't have to succeed.

15 Look, I think the best way for us to spend our
16 time is -- and this is helpful to me and I'll go work on
17 the instructions and I'll talk to you about the
18 instructions tomorrow morning and then you'll argue the
19 case. But it sounds to me like you and I, at the
20 moment, Mr. McGinty, are repeating ourselves.

21 MS. SEDKY: Your Honor, may we be heard
22 briefly?

23 THE COURT: What's that?

24 MS. SEDKY: May we be heard briefly about the
25 instruction?

1 THE COURT: Yes.

2 MS. SEDKY: We do not intend to seek an aiding
3 and abetting instruction at this time.

4 THE COURT: Good. I was going to get to that.

5 MS. SEDKY: Just to inform the Court of that.

6 And there was one particular instruction that we
7 wanted to, um, flush out and get a better understanding
8 of the Court's likely ruling and that is with respect to
9 the cooperating witnesses.

10 As the, um, proposed instruction currently reads,
11 and I believe --

12 THE COURT: Well, I'll tell you what I'm
13 likely to say about the cooperating witnesses. Okay?

14 (Pause.)

15 THE COURT: Something along the following --
16 people with an immunity agreement. All right. Wait a
17 second here.

18 (Pause.)

19 THE COURT: It will be something like the
20 following.

21 "You heard testimony that certain witnesses
22 testified pursuant to an order of immunity or were given
23 immunity by the government. The immunity order or
24 agreement provides that no testimony by the witness can
25 be used against him or her directly or indirectly except

1 in a prosecution for perjury if he testifies falsely or
2 otherwise violates the terms of the immunity. The
3 government is entitled to provide or apply for an
4 immunity order and present the testimony of an immunized
5 witness.

6 Some people, in the position of the immunized
7 witnesses, are entirely truthful when testifying.
8 However, the testimony of such witnesses should be
9 examined by you with greater care than the testimony of
10 an ordinary witness. You should scrutinize it closely
11 because a witness who provides information, or pursuant
12 to a grant of immunity, and perhaps to avoid being
13 prosecuted himself or herself, has a greater motive to
14 provide false information than someone who's not been
15 given immunity.

16 As with all the evidence, in deciding whether a
17 jury will credit some or all of an immunized witness's
18 testimony, you should consider, among other things,
19 whether it was contradicted or corroborated by other
20 evidence in the case. You should scrutinize such
21 testimony with great care and rely on it with caution.
22 If after doing so you find some or all of the testimony
23 from an immunized witness to be true, you should give it
24 such weight as you believe it deserves."

25 I mean, something along those lines.

1 MS. SEDKY: And, your Honor, in the context of
2 a cooperation agreement -- for example, Mr. Phillips is
3 the only witness who is testifying pursuant to an
4 existing cooperating agreement, we think that this
5 instruction would relate directly to his testimony. We
6 take a different view about an immunized witness because
7 we're not clear about what their incentive is to
8 fabricate.

9 THE COURT: Why did you give them immunity if
10 you -- well, what's their incentive to fabricate? You
11 won't give them immunity unless they tell the government
12 useful information, things that tends to incriminate --
13 they wouldn't have gotten immunity, at least from me,
14 unless they had a valid Fifth Amendment right not to
15 testify, unless they were at least a subject of an
16 investigation, not an independent third-party witness,
17 and they might be a target of an investigation in the
18 Department of Justice lexicon. So they do have
19 incentives.

20 MS. SEDKY: To fabricate their testimony on
21 the stand?

22 THE COURT: Yes. This is -- this is
23 essentially -- if you look at the First Circuit pattern
24 instruction 2.07, it says: "You have heard the
25 testimony of X. He provided evidence under an agreement

1 with the government. He participated in the crime
2 charged against the defendant. Some people in this
3 position are entirely truthful when testifying. Still
4 you should consider the testimony of these individuals
5 with particular caution, they may have had reason to
6 make up stories or to exaggerate what others did because
7 they wanted to help themselves."

8 That's the jurisprudence of the First Circuit.

9 MS. SEDKY: And my understanding, and please
10 correct me if I'm wrong, but I thought that that was
11 really geared towards a cooperating witness as opposed
12 to --

13 THE COURT: You're wrong.

14 MS. SEDKY: Okay. Thank you for telling me.

15 THE COURT: Well, why did you give them
16 immunity? Look, you could have prosecuted Lindquist.

17 MS. SEDKY: We gave them -- we offered
18 immunity to all of the witnesses because we thought it
19 was the right thing to do.

20 THE COURT: But you could argue -- I'm not --
21 I'm instructing them to examine this with particular
22 care. You should say, "Mr. Larosa didn't even know
23 Mr. Harris, he's got no reason to" -- you can argue what
24 you want to argue, within reason, but you wanted to know
25 what I'm going to tell them and that's what I'm going to

1 tell them.

2 MS. SEDKY: Thank you, your Honor.

3 MR. MCGINTY: Your Honor, in view of the
4 dismissal of Count 1, the conspiracy charge, um,
5 Mr. Harris moves for a mistrial on account of the
6 evidentiary spillover in the indictment, secondly, the
7 reading of the indictment which included matters that
8 it's going to be difficult for a jury to disregard, and
9 finally, um, the government's opening statement, which I
10 had, at the time, made a motion for a mistrial, where
11 they made repeated reference to a black market and MAC
12 addresses and so forth, all things about what the forum
13 was going to be and what the proof of it was going to
14 be. And, um, each of those things contribute to an
15 enduring impression and, um --

16 THE COURT: Well, what evidence -- there are
17 two things. All of the allegations of the conspiracy
18 count are incorporated by reference, I believe, in the
19 wire fraud counts. I don't -- and I didn't admit
20 anything with a limiting instruction.

21 (Pause.)

22 THE COURT: The grand jury alleges Paragraphs
23 1 to 13 and 16 to 58 -- and this is in Paragraph 50. I
24 didn't admit any evidence with a limiting instruction.
25 I directed the jury and I've instructed the jury that

1 the indictment is only an accusation, it's not evidence
2 or proof, and it's also -- I've also instructed the jury
3 that anything the prosecutors say and anything you say
4 is not evidence. The motion for a mistrial is denied.

5 MR. MCGINTY: One point I haven't mentioned.
6 The Court's ruling with respect to the personal conduct
7 of Mr. Harris, having admitted that as evidence of the
8 conspiracy, which I respectfully submit would not be
9 admissible with respect to substantive counts.

10 THE COURT: And the jurisprudence is -- I can
11 give it to you. The jurisprudence is -- and I cited it
12 yesterday. It doesn't even have to be a charge in the
13 indictment for evidence to come in -- a conspiracy
14 charged in the indictment for evidence to come in as
15 co-conspirator hearsay. The First Circuit said in
16 **Candalaria-Silva**, 162 F.3d 698 at 706, quote; "It is not
17 necessary for the indictment to charge a conspiracy in
18 order to admit co-conspirator statements under
19 801(d)(2)(E)".

20 So let me think through what I'm saying here. All
21 right. Well, let me think through whether you've got
22 something.

23 (Pause.)

24 THE COURT: The only co-conspirator statements
25 I've admitted, um, are Lindquist, Phillips, Mr. T, and

1 MooreR, and I continue to be completely comfortable that
2 those conspiracies, with Mr. Harris, were proven by a
3 preponderance of the evidence. The reason I said I was
4 inclined to admit -- to allow the Rule 29 -- or I did
5 allow the Rule 29 motion on conspiracy is that, um,
6 there wasn't sufficient proof with regard to Larosa,
7 Madeira, or Hanshaw, and there wasn't sufficient proof
8 that the conspiracy with Lindquist and Phillips endured
9 into 2008 when the downloading by the FBI in
10 Massachusetts, um, would have been the act causing
11 venue.

12 So whatever came in with regard to Lindquist,
13 Phillips, um, Mr. T, and MooreR is utterly independent
14 of my analysis on Rule 29. Mr. Harris's own statements
15 came in under Rule 801(d)(2)(A), they're admissions by a
16 party opponent.

17 MR. MCGINTY: With respect to what part of the
18 indictment gets to the jury, um, the -- previously the
19 dismissed counts involving Mr. G-E-N-O-H, Genoh, um,
20 were excised from the indictment. Um, the conspiracy
21 here ought to be excised from the indictment.

22 But may I inquire if the Court would inform the
23 jury about the fall of the conspiracy, um, and what
24 impact that has on their evaluation of the evidence.

25 THE COURT: Whose evaluation?

1 MR. MCGINTY: The jurors. I mean, when the
2 jury heard this, there was a charge of conspiracy. It
3 had the indictment read to them, so --

4 THE COURT: But they -- well, it may -- I mean
5 this is good. Maybe I ought to see you later this
6 afternoon. But I'll tell the jury that they're not
7 going to -- I'd be inclined -- and this is off the top
8 of my head, it's a good question of yours, like many
9 others, that --

10 MR. MCGINTY: Even I repeat myself.

11 THE COURT: Yeah, this is a different point.

12 (Laughter.)

13 THE COURT: Well, I mean, you and the
14 government can talk about whether there's anything that
15 should be redacted, but, you know -- and probably what
16 should be redacted are the, perhaps, the paragraphs that
17 are not -- well, let's see what those paragraphs are.

18 (Pause.)

19 THE COURT: 14 and 15 are not realleged. 14
20 and 15 actually are the -- 15 is the charging paragraph
21 and 14 is the incorporation of 1 to 30. It's possible
22 that should be redacted.

23 But I'm going to tell them that they're not going
24 to be called upon to decide whether a conspiracy has
25 been proven, that they can consider all the evidence,

1 unless it was admitted with a limiting instruction, and
2 I don't recall any, and they have to decide whether wire
3 fraud's been proven and I'll explain to them the
4 elements of wire fraud.

5 Does that sound like the right approach to the
6 government?

7 MR. BOOKBINDER: Yes, your Honor.

8 THE COURT: All right. And will the
9 government redact the indictment to take out the counts
10 that are not incorporated in the wire fraud counts?

11 MR. BOOKBINDER: We will.

12 THE COURT: All right. If you can get me that
13 this afternoon, it would be valuable.

14 MR. MCGINTY: May I just have a moment, your
15 Honor?

16 THE COURT: Yes.

17 (Pause.)

18 THE COURT: What's that?

19 MR. MCGINTY: May I just have a moment, your
20 Honor?

21 THE COURT: Yes.

22 (Pause.)

23 MS. SEDKY: Your Honor, we have one suggestion
24 to allay the -- we could add a line that says "scheme to
25 defraud" and take out "manner and means of conspiracy

1 and overt acts," because we would submit it's all the
2 same evidence, it goes to the scheme to defraud.

3 MR. MCGINTY: I think we have a fundamental
4 disagreement. The government's view is that the count
5 that would be excised would be simply the -- it's here
6 in Paragraph 14, I believe, in the indictment
7 incorporated as 15.

8 THE COURT: Actually, I don't have -- this
9 shouldn't change anything, but I don't have the present
10 version of the indictment for some reason. This is the
11 same.

12 (Pause.)

13 MR. MCGINTY: The only difference is that
14 there was a paragraph that related to Mr. Genoh and
15 because he was eliminated, that reduced the paragraph.
16 So Paragraph 15 became 14, so --

17 THE COURT: Oh, hold on a second. I
18 apologize.

19 (Pause.)

20 THE COURT: All right. So that's right. So
21 it's 13 and 14 that should be removed.

22 MR. BOOKBINDER: And, your Honor, we would
23 simply take right below that it says "manner and means
24 of the conspiracy." It may be simplest just to take
25 that heading out.

1 THE COURT: Like I say, take that heading
2 out. The headings are not allegations.

3 MR. BOOKBINDER: And later on I believe it
4 says "overt acts." It doesn't specifically reference a
5 conspiracy, so we could leave it or take it out, either
6 way. I don't know.

7 MR. MCGINTY: Well, the problem here is that
8 this is replete with things that were unproven. I mean,
9 looking at Paragraph 21, I believe formerly 22, um, it
10 also -- and this is in the third line down, "It also
11 contains forums" -- and this is the website, "forums,
12 bulletin boards that allow Harris and his
13 co-conspirators and users to exchange information about
14 product updates and provide tutorials and advice about
15 installing and using Harris's cable modem hacking
16 products."

17 THE COURT: Well, we had evidence on that.

18 MR. MCGINTY: "Harris and several
19 co-conspirators moderated and personally participated in
20 these on-line discussion forums." Um --

21 THE COURT: I'm sorry. You say there's no
22 evidence of that?

23 MR. MCGINTY: And if you go to the next
24 paragraph --

25 THE COURT: Well, I don't know, are you saying

1 there's no evidence of that?

2 MR. MCGINTY: I'm saying there's no evidence
3 relating to forums and participation in forums for
4 purposes of doing that, yes. They had it. And then on
5 the next paragraph: "Through these forums users discuss
6 with Harris's co-conspirators and each other acquiring
7 and exchanging stolen MAC addresses."

8 THE COURT: You see, this is -- the indictment
9 -- this is not charging language in the indictment for
10 the conspiracy count, that was in the revised
11 indictment, Paragraph 14. Um, I mean, I'm going to tell
12 them the indictment is not evidence or proof and I'm
13 going to tell them what has to be proven.

14 MR. MCGINTY: But the -- but in here it talks
15 about co-conspirators, it mentions them as
16 co-conspirators, suggesting that Harris is with them a
17 conspirator, which is not what's charged. It refers to
18 the forums, it refers to discussions about techniques
19 that ISPs employ, detect and to block the use of
20 Harris's cable. This is not admitted. It's not part of
21 the evidence. So this is a narrower --

22 THE COURT: Why do you say it's not admitted?
23 I heard testimony about techniques that are used to
24 frustrate Mr. Harris and people like him.

25 MR. MCGINTY: But you didn't hear that the

1 forums were the means by which that was exchanged. And
2 this becomes a --

3 THE COURT: I'm sorry.

4 MR. BOOKBINDER: There's plenty of testimony
5 about people using the forums and Mr. Phillips testified
6 about it, Mr. Hanshaw testified about it.

7 THE COURT: Didn't I -- weren't there posts
8 from Mr. Harris's --

9 MR. BOOKBINDER: The book, Mr. Harris's own
10 book.

11 THE COURT: What we had this morning about
12 "I'm looking for a friend to trade MACs."

13 MR. BOOKBINDER: Right.

14 THE COURT: I mean, talk to the government
15 about whether there's something in here that ought to go
16 out. But I think my general instruction that this is
17 not evidence or proof and --

18 MR. MCGINTY: If we go to Page 6 where it says
19 "overt acts," "Harris and his co-conspirators committed
20 the following overt acts within the District of
21 Massachusetts," followed by a laundry list of
22 predicates, um, and then we have a TCNISO.net forums
23 which describes what the forum content was, not as to
24 what the witness testified to, but forum content as if
25 this was derived directly from the forums, for which

1 there is no evidence to support it.

2 THE COURT: I know, but the indictment is not
3 evidence.

4 MR. MCGINTY: Oh, the indictment is not
5 evidence, but the indictment can be prejudicial and
6 giving them a narrative of --

7 THE COURT: All right. File a written memo
8 this afternoon. Give me some authority. Rule 29 and
9 the motions are granted, um, and the indictments are
10 redacted. The difficulty I think you have here is that
11 the allegations generally, they're incorporated, and
12 there were facts alleged to be relevant to both the
13 conspiracy and the scheme to defraud. And at the
14 moment, as I say, I didn't let in any evidence with a
15 limited instruction, that you should consider this just
16 on the conspiracy and not on the wire fraud.

17 MR. MCGINTY: No, but if I might just go at
18 this in a slightly different way. Were there an
19 indictment on wire fraud which consisted only of the
20 Paragraph 54 and 55 on Pages 11 and 12, in other words,
21 the spare wire fraud charges, if I were to move to
22 dismiss that, my dismissal would be denied, because it
23 provides sufficient notice of the scheme, the dates, um,
24 and the conduct. So why the government gets the
25 narrative of the conspiracy to come in when there is a

1 spare recitation of what the charge is, um, I'm at a
2 loss to understand.

3 THE COURT: You could have made that motion
4 before trial. But this, um -- at the moment I don't
5 perceive a problem, given the instructions that I'm
6 going to give.

7 All right. Um, a couple other issues.

8 How long does the government want for its closing
9 argument including the rebuttal, which needs to be a
10 brief rebuttal, not a second closing argument?

11 MR. BOOKBINDER: Correct, your Honor. We'd
12 like -- at this point can we reserve an hour combined?
13 I expect it will be somewhat less than that, but we just
14 want to be sure.

15 THE COURT: And you're going to break it up?

16 MR. BOOKBINDER: Yes, it will be about, you
17 know, say 45 minutes for --

18 THE COURT: No, I mean between the two of you.

19 MR. BOOKBINDER: Oh, yes, I'm sorry, your
20 Honor, I'll do the closing and then Ms. Sedky will do
21 the rebuttal.

22 THE COURT: And how long do you think the
23 rebuttal is going to be?

24 MR. BOOKBINDER: Um, you know, again, for the
25 purposes now, 45 minutes for the closing and 15 minutes

1 for the rebuttal. But I project it will be even shorter
2 than that. Maybe 40 minutes and 10 minutes.

3 THE COURT: Okay. I guess that depends on
4 what I hear.

5 And, Mr. McGinty, do you want about an hour?

6 MR. MCGINTY: Yes, that's fine.

7 THE COURT: The government will go first and
8 last. All right.

9 And then, you know, you've got a lot to do, but
10 before the exhibits go back there, you have to be
11 satisfied with them beforehand, you know, a paper set of
12 the exhibits and also a disk that you're confident has
13 the right things on it. And if you get the paper -- and
14 I'll be old fashioned, but if you get the paper exhibits
15 in shape and you have to do some more work to double-
16 check the disk, then that's okay.

17 MR. MCGINTY: There's one thing we haven't
18 thought about, which is the book. Part of the book, a
19 chapter of the book has been provided electronically by
20 the government and the book itself is in evidence, so
21 part of it is here electronically and part of it is
22 available in hardcopy. I -- we were discussing what the
23 options there were and my preference would be that the,
24 um, part of the book that's there electronically should
25 be removed, that the items -- it's a single item, so the

1 jury should consider it a single item rather than only
2 looking at a part of it on the electronic presentation.
3 So my preference would be that --

4 THE COURT: Does the government object to
5 that?

6 MR. BOOKBINDER: No.

7 THE COURT: Okay. I think that's fine.

8 MR. MCGINTY: I do that just to shorten the
9 amount of time it's going to take us to go through the
10 exhibits.

11 THE COURT: No, no, the government's agreed,
12 so I don't have to allow the request, which I would have
13 been inclined to do.

14 All right. You've got closings to prepare and
15 I've got jury instructions to prepare. I don't think
16 I'll plan to see you again today.

17 MR. BOOKBINDER: Your Honor, just one matter.
18 We provided to Mr. McGinty two charts or posters that we
19 expect to use in the closing, one is a summary of the
20 wire fraud elements based on the Court's previous
21 instructions.

22 THE COURT: No, you can't do it.

23 MR. BOOKBINDER: Can't use them?

24 THE COURT: Cannot. In fact, there's First
25 Circuit law that says I can't show them a summary of the

1 instructions, that it would be misleading or give
2 improper emphasis.

3 MR. BOOKBINDER: All right. We won't do
4 that.

5 Then the second one is the chart -- it's taken
6 from the chart in the indictment that sets out the
7 specific wire fraud counts, the date, and the wire
8 transmission --

9 THE COURT: That's okay.

10 MR. BOOKBINDER: -- and we've served notice of
11 what the wire transmission is because there's three or
12 four lines of text in the indictment. But we'd like to
13 use that as well, if that's one is fine?

14 THE COURT: Yeah, that's fine.

15 MR. McGINTY: Your Honor, the --

16 THE COURT: Go ahead. I mean, in concept it's
17 fine.

18 MR. McGINTY: Your Honor, what they've done is
19 the original offer that the government made was to
20 include all the language that's found on Page 11 and 12,
21 which is sort of the spreadsheet that has the count and
22 the approximate date of the wire transmission on Page 11
23 and 12. All of that language was included. The
24 government then changed it to delete, um, certain
25 language, um --

1 THE COURT: Because there was no evidence?

2 MR. MCGINTY: No, because it just referred to

3 --

4 MR. BOOKBINDER: Because it's a chart and it's
5 shorter and simpler and easier for the jury to see. I'm
6 happy to show the Court a copy if you would like to see
7 it.

8 THE COURT: Yeah, why don't you show it to
9 me.

10 (Pause.)

11 THE COURT: What's the next letter?

12 (Pause.)

13 THE COURT: I think if you're going to use a
14 chart, it should be what's in the indictment. And some
15 of it, I think, you don't have evidence of, right? So
16 maybe Mr. McGinty wants to redact it for the -- this I
17 have another copy of the indictment.

18 (Pause.)

19 THE COURT: But, Mr. McGinty, would you prefer
20 they use exactly what's in the indictment?

21 MR. MCGINTY: Yes, your Honor.

22 THE COURT: Okay, you can use that.

23 MR. BOOKBINDER: Okay, then that's what I'll
24 do.

25 THE COURT: All right. Well, I'll look

1 forward to Ms. Sedky's cases and read them to see
2 whether this is a legal matter or a factual matter. And
3 unless I otherwise order it, I'll see you at 9:00
4 tomorrow morning.

5 The Court is in recess.

6 (Adjourned, 12:40 p.m.)

7
8 C E R T I F I C A T E

9
10 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do
11 hereby certify that the forgoing transcript of the
12 record is a true and accurate transcription of my
13 stenographic notes, before Chief Judge Mark L. Wolf, on
14 Tuesday, February 28, 2012, to the best of my skill and
15 ability.

16
17
18
19 /s/ Richard H. Romanow 11-07-12

20 _____
RICHARD H. ROMANOW Date